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No. 82-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE DON'T BANKRUPT WASHINGTON COMMITTEE,
Appellant,

v.

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, SEATTLE-FIRST NATIONAL BANK AND MORGAN GUARANTY TRUST COMPANY OF NEW YORK, AND THE UNITED STATES OF AMERICA,
Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit

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JURISDICTIONAL STATEMENT

STIMSON BULLITT
RIDDELL, WILLIAMS, BULLITT & WALKINSHAW
4400 Seattle-1st National Bank Building
Seattle, Washington 98154
206/634-3600

BENJAMIN W. HEINEMAN, JR.*
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
202/429-4000

Counsel for the Don't Bankrupt Washington Committee, Appellant

* Counsel of Record

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QUESTIONS PRESENTED

During more than 170 years of Contract Clause adjudication, this Court has developed doctrines that have sought to resolve the fundamental tension at the core of the Clause between the reliance interests of the parties to a contract and the interests of a state in exercising its sovereign power in light of unforeseen and dramatically changed circumstances. Relying on the Contract Clause, the Court of Appeals' decision on appeal strikes down a state statute that does not repudiate existing, *substantive* financial obligations but instead establishes a new *process* by which a political subdivision of the state makes decisions about whether to incur additional, multi-billion dollar debt—a political subdivision which, through mismanagement, had already imposed multi-billion dollar debt on the state's citizens. But the Court of Appeals fundamentally misreads and misapplies this Court's decisions. The decision on appeal allows the federal judiciary to ride roughshod over a state's sovereign interest in gaining control in the future of a political subdivision that has gone out of control in the past.

The decision on appeal is thus in direct conflict with the doctrines of this Court that have sought to resolve the tension at the core of the Contract Clause and to protect the legitimate interests of the states. With the recent revival of the Contract Clause as a constitutional basis for invalidating state laws, this case provides a vehicle for needed clarification and reaffirmation of those doctrines that protect state interests. In that context, the decision on appeal presents the following specific questions.

(1) Whether the Court of Appeals' decision should be reversed because it is in direct conflict with this Court's express reservation doctrine which allows states explicitly to reserve in their statutes the right to

modify contracts in the future without violating the Contract Clause of the United States Constitution?

(2) Whether the Court of Appeals' decision should be reversed because it is in direct conflict with this Court's Reserved Powers Doctrine which, despite the strictures of the Contract Clause, does not require a state to adhere to a contract that surrenders the state's essential sovereign authority to structure the governance of a state's political subdivisions?

(3) Whether the Court of Appeals' decision should be reversed because it is in direct conflict with *Energy Reserves Group Inc.* v. *Kansas Power & Light Co.*, 51 U.S.L.W. 4106, 4109 (January 24, 1983) and with the appropriate legal standards for determining whether the constitutional requirement of "substantial impairment" has been met in a Contract Clause challenge, especially the requirement that a state law must upset the legitimate expectations of the contracting parties?

(4) Whether the Court of Appeals' decision should be reversed because it is in direct conflict with this Court's "reasonable and necessary" test for determining whether a state law which substantially impairs contract is nonetheless valid under the Contract Clause and because, in particular, it improperly used a "strict" application of the "reasonable and necessary" test on the erroneous assumption that the contracts of a political subdivision comprised of utilities are the contracts of a state, rather than applying the appropriate, "deferential" version of the test used in *Energy Reserves* where the contracts allegedly impaired were those of a public utility?

(5) Whether the Court of Appeals' decision should be reversed, pursuant to this Court's supervisory power, because neither the District Court nor the Court of Appeals ever cited to the voluminous record (27 wit-

nesses and more than 100 exhibits); because, rather than remanding the case in light of the District Court's manifest violation of Rule 52, F.R.Civ.P., the decision resolved factual disputes on constitutional issues that were not the subject of *any* factual findings in the District Court; and because the Court of Appeals' decision is thus outside the appropriate functions of an appellate court?

PARTIES BELOW

Appellants below in these consolidated cases were the State of Washington and the following Washington State officials: the Governor, John Spellman, the Secretary of State, Ralph Munro, and the Attorney General, Kenneth O. Eikenberry. The Don't Bankrupt Washington Committee was intervenor-appellant in both cases. Appellees below were the United States and three banks, Continental Illinois National Bank and Trust Company of Chicago, Seattle-First National Bank and Morgan Guaranty Trust Company of New York.

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CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, ET AL.,
Appellees.

JURISDICTIONAL STATEMENT

The Don't Bankrupt Washington Committee appeals from the final judgment of the United States Court of Appeals for the Ninth Circuit, dated January 11, 1983, holding that the Washington State Energy Financing Voter Approval Act, chapter 6, 1981 Wash. Laws (2d ex.sess.) [hereinafter "Initiative 394" or "394"] is not constitutional under the Contract Clause of the United States Constitution as applied in these consolidated cases.

OPINIONS BELOW

The opinion of the Court of Appeals, which appears in the appendix to the jurisdictional statement [hereinafter "App."], p. 1a, is not yet reported. The relevant portions of the transcript of the District Court's oral findings of fact and conclusions of law, which were read into the record on June 29, 1982, are unreported. See App., p. 21a. (transcript excerpts).

JURISDICTION

The judgment of the Court of Appeals was entered on January 11, 1983. See App., p. 1a. No motions for rehearing were filed. A notice of appeal to this Court was filed in the Court of Appeals for the Ninth Circuit on January 20, 1983. See App., p. 24a. This appeal is being docketed in this Court within 90 days of the final judgment below. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Contract Clause of the U.S. Constitution, Art. I, § 10, Cl. 1, provides: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." The case also involves two Washington State statutes: Initiative 394, chapter 6, 1981 Wash. Laws (2d ex.sess.) and the State law providing authority for creation of joint operating agencies. RCW ch. 43.52. Pertinent provisions of these statutes are set forth in the Appendix at pp. 26a-34a.

STATEMENT OF THE CASE

Enacted by an overwhelming 58-42 percent margin at the November 3, 1981 Washington general election, Initiative 394 was a measured response to an unforeseen economic crisis created by $20 *billion* cost overruns and multi-year construction delays at the five nuclear power projects then under simultaneous construction by the Washington Public Power Supply System [hereinafter "WPPSS"], a political subdivision of the State. The Initiative was drafted after an exhaustive State Senate report [hereinafter "State Senate Inquiry"] found, in January, 1981, that WPPSS "mismanagement" was the "most significant cause of the cost overruns and schedule delays" and that, despite dramatically increased costs and changed economic assumptions, WPPSS had not conducted needed cost-effectiveness studies of the Projects

and did not intend to do so.[1] The Initiative established a process—an independent cost-effectiveness study and voter approval of WPPSS's future financing strategy—which WPPSS had to follow before it could impose even greater debt on the State's ratepayers through issuance of additional revenue bonds to finance future work on the Projects. The Initiative did not mandate a substantive result—did not, that is, repudiate any existing debt or terminate any of the Projects. This jurisdictional statement is being filed by the Don't Bankrupt Washington Committee [hereinafter "the Committee"], a citizens' group that drafted and campaigned for Initiative 394. The Committee intervened as defendant-appellant and participated extensively in the consolidated proceedings below.

(1) *WPPSS.* The Washington Public Power Supply System was organized in 1957 as a municipal corporation of Washington State (a "joint operating agency"), with the authority to construct, operate and own plants for the generation of electricity and to issue revenue bonds to finance their construction. RCW § 43.52.300 & RCW § 43.52.3411. WPPSS' membership consists of 19 public utility districts and four cities (the "Members"). The management and control of WPPSS have been vested solely in a Board of Directors (the "Board") which, until recently, has consisted of one representative from each of the 23 Members.

The Five Projects. WPPSS' major undertaking has been the attempted simultaneous construction of five massive nuclear power projects—three (Projects 1, 2 and 3)

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[1] Exhibit 26, pp. 3-6. Neither the Court of Appeals nor the District Court *ever* cited to the extensive record admitted into evidence. References in this jurisdictional statement to "CR" (clerk's record) are to items listed on the Trial Court Docket sheet that became part of the record on appeal (including testimony from 27 witnesses) and references to "Exhibits" are to the more than 100 exhibits admitted into evidence that were also part of the record on appeal and were listed in the Amended Pretrial Order. CR 170.

in conjunction with certain participating utilities and the Bonneville Power Administration [hereinafter "BPA" or "Bonneville"] and two (Projects 4 and 5) in conjunction with certain Participants alone. BPA, an agency of the Federal government, markets electricity to the Northwest from Federal hydroelectric projects. The Participants are approximately 100 utilities which vary slightly for each of the five Projects. Construction and financing of all five Projects began in the early to mid-1970s, but none of the Projects has been completed. WPPSS has, to date, issued more than $8 billion in revenue bonds for all five Projects, making it the largest issuer of tax-exempt debt in the United States. The Participants for all five Projects are obligated by contract to pay off this debt from rates charged to their ratepayers even if the Projects are never completed—and BPA guarantees payment of that debt for Projects 1-3 through its ratepayers. WPPSS—popularly known as "Whoops"—has become a nationally known financial "fiasco" in significant part due to WPPSS mismanagement.[2]

The Relevant Contracts. WPPSS' organic statute, RCW ch. 43.52, provides WPPSS' authority for financing, constructing and operating Projects 1-5. App., pp. 33a-34a. This statute is the basis for, and is incorporated in, the three interrelated contracts relevant to Projects 1-3 and to the disposition of this case—the Project Agreements between WPPSS and BPA, the Net Billing Agreements between WPPSS, BPA and the Participants and the bond resolutions between WPPSS and bondholders. See App., p. 3a; U.S. Brief in 9th Cir. at 26-27. These contracts require WPPSS to issue bonds to complete the Projects, but this duty is heavily qualified in the contracts themselves.

The Court of Appeals' discussion of these contracts is wrong or misleading in two important respects. First,

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[2] "A Fiasco That May Rock Municipal Bonds," Business Week, p. 94 (Feb. 7, 1983); Peter W. Bernstein, "A Nuclear Fiasco Shakes the Bond Market," Fortune, p. 100 (Feb. 22, 1982).

Projects 1-3 were not begun pursuant to BPA's federal authority or to any federal "program." See App., pp. 3a. In fact, BPA's lack of authority to build and finance nuclear projects directly led it informally to persuade WPPSS to build Projects under authority of RCW ch. 43.52, the State's statute. CR 170, ¶¶ 23-38. Second, WPPSS' obligation to BPA and the bondholders to issue bonds to complete Projects 1-3—the duty allegedly impaired by 394—is not absolute. See App., pp. 3a-6a, 11a. Appellees conceded below that the Projects should only be completed if cost-effective.[3]

The Problems. The Court of Appeals never even mentioned the 11 month, 184 witness State Senate Inquiry—which is a crucial document in the legislative history of Initiative 394. The opinion's description of the problems which led to 394 was limited to a sentence and omits WPPSS mismanagement. See App., p. 6a. By contrast, appellees never contested the legislative history of the Initiative admitted into evidence, see CR 152 (Affidavit of Committee Chairperson Steve Zemke) and Exhibits 107A-107Z, which demonstrates that Initiative 394 was intended to respond to the following problems *inter alia*: (a) massive estimated cost increases for all five Projects from $4 to $24 billion—including a May, 1981 jump in the estimates of nearly $7 billion[4]— which made the WPPSS Projects among the very worst in the nation in terms of cost overruns for comparable plants, Exhibit 106; (b) multi-year delays that dramatically added to the costs of the Projects;[5] (c) significantly changing economic assumptions, primarily a decline in estimated annual increase in projected energy demand

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[3] Banks' Opp. to Motion to Dismiss, p. 5, CR 71; Exhibit 110, Answer #22.

[4] Exhibit 26, p. 5.

[5] By early 1981, the completion dates had fallen years behind schedule for all five Projects: No. 1 (5 years, 5 months); No. 2 (6 years); No. 3 (4½ years); No. 4 (4 years); No. 5 (2½ years). Exhibit 26, pp. 19-21.

from seven percent a year in the early 1970s to less than two percent by 1981;[6] (d) the State Senate Inquiry's finding that WPPSS' mismanagement was the "most significant cause" of the multi-billion dollar cost increases, in important part, because WPPSS had never used its annual budget as a management tool to constrain costs, Exhibit 26, pp. 3-6; and (e) the striking failure of WPPSS to conduct cost-effectiveness studies in light of major, unforeseen changes that had occurred during the 1970s, *id.*, pp. 3-6, 58.

Appellee Morgan's bond analysis department said that the State Senate Inquiry was "*damning . . . objective and thorough*" and, if correct, "*billions of dollars have already been wasted by mismanagement* [and the WPPSS'] *construction budget is practically out of control. . . .*" Exhibit 103F, pp. 1-3. (Emphasis supplied.) The introduction to the State Senate Inquiry said WPPSS' cost overruns "threaten WPPSS itself, the region's utilities, our economy and most importantly the well-being of the Northwest's citizens." Exhibit 26.

(2) *Initiative 394.* In light of the grave problems created by WPPSS, the purposes of Initiative 394 included the following as applied to WPPSS Projects 1-5, CR 152, ¶¶ 19-27: (a) ensure a vote in WPPSS' future financing decisions for ratepayers who would bear the burden of additional debt, Initiative 394, § 2; (b) ensure WPPSS' consideration of cost-effectiveness criteria in its future financing decision; and (c) force WPPSS to live within stated budgets in the future. To accomplish these goals, the Initiative mandates two requirements if an existing, incomplete plant poses major public policy problems—if, that is, it is 200 percent over budget and, as of July 1, 1982, requires more than $200 million to complete. Initiative 394, § 3(2). First, WPPSS

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[6] WPPSS' Treasurer Perko Dep., p. 22, CR 141 (if lesser demand known in early 1970's, projects would not have been built); Exhibit 26, p. 58 (a "substantial change in the original assumptions . . .").

must hire an independent consultant to prepare a draft cost-effectiveness study of each WPPSS Project. *Id.*, § 5-6. Second, after a period of public comment and issuance of a final cost-effectiveness study, WPPSS must obtain from the voters in WPPSS' 23 Member jurisdictions "authority for the expenditure of funds" for any *future* construction before selling revenue bonds in the *future* to finance that construction. *Id.*, § 4. This requirement, as applied to Projects 1-3, became effective on July 1, 1982.

Opponents of the Initiative spent $1.3 million, dwarfing the Committee's expenditures of $215,000, in the hotly contested, widely debated 1981 election campaign. Exhibit 107Z. Nonetheless, on November 3rd, Initiative 394 received 532,000 votes for adoption (58 percent of those voting) and 384,000 against (42 percent). See generally, CR 152, ¶¶ 28-50 (Zemke Affidavit). Initiative 394 was never implemented with respect to Projects 4-5 because those Projects were terminated by WPPSS in January, 1982 with $2.25 billion in bonds outstanding. The Initiative has not yet been implemented for Project 1 because it was deferred for up to five years by WPPSS in April, 1982. In late Spring, 1982, WPPSS selected an independent consultant who began the cost-effectiveness study of Projects 2-3. At the time of the District Court's decision (June 29, 1982), the consultant had not completed a draft study, and WPPSS had not scheduled an election pursuant to Section 4 of the Initiative.

Leading bond analysts testified without contradiction that Initiative 394 had benefited appellees in the past and might, if fully implemented, benefit them in the future. Titmuss Dep., pp. 86-107, CR 165; Sitzer Dep., pp. 86-106, 166-170, CR 187. For example, a "yes" vote in an election held under 394 would develop a much needed public consensus among ratepayers on the need for the Projects and would impose much needed budget discipline on WPPSS. A "no" vote would be beneficial if the Projects were not clearly cost effective.

(3) *The Proceedings Below.* In December, 1981, three national banks—Morgan Guaranty, Continental Illinois and Seattle First—in their capacities as trustees for the bondholders in Projects 1-3, respectively, filed suits against the State of Washington, the Governor, the Attorney General and the Secretary of State seeking, *inter alia*, a declaration that Initiative 394 was void under the Contract Clause because the "mere existence" of its voter approval requirement for the issuance of future debt—which the voters would have to bear—impaired WPPSS' obligation to finance completion of Projects 1-3. (The Initiative's cost-effectiveness requirement was conceded to be valid.) In April, 1982, the United States filed a similar suit against the same defendants. The Committee intervened as defendant in both suits, which were consolidated. All parties engaged in extensive, expedited discovery and submitted the case on a stipulated record which included testimony from 27 witnesses and more than 100 exhibits, totaling thousands of pages. Appellants submitted more than 80 pages of proposed findings. Less than two working days after receipt of this complex record, including one day devoted to oral argument, the District Court ruled from the bench on June 29, 1982 that Initiative 394 violated the Contract Clause. See App., pp. 21a-23a. It failed to cite to any contractual provision that was impaired or to reference any part of the extensive record, although there were key issues of fact that the parties had put in dispute. See Part E, *infra*.

On January 11, 1983, the Court of Appeals held 394 violated the Contract Clause as applied to Projects 1-3. See App., p. 20a. Without ever citing to 394's history, to the record or to the contract terms impaired, the Court held that, once executed, the relevant contracts vest *total* discretion in WPPSS and BPA to determine whether huge additional indebtedness should be incurred by a State municipal corporation and then borne by the State's ratepayers, despite WPPSS mismanagement and multi-billion dollar cost-overruns.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Although by its terms absolute ("no State shall . . . pass any . . . Law impairing the Obligation of Contracts"), the Contract Clause has not been so interpreted by this Court. U.S. Const., Art. I, § 10, Cl. 1. Instead, during more than 170 years of Contract Clause adjudication, this Court has developed doctrines which have sought to reconcile the fundamental tension at the core of the Clause between the reliance interests of the parties to a contract and the interests of a state in exercising its sovereign powers in light of unforeseen and dramatically changed circumstances.[7]

The decision of the Court of Appeals is in direct conflict with a number of doctrines announced by this Court to resolve that tension and protect the interests of states—including the express reservation doctrine, the Reserved Powers Doctrine, the substantial impairment requirement and the "reasonable and necessary" test. This decision must not be allowed to stand, since its fundamental misreading and misapplication of this Court's decisions allows the federal judiciary to ride roughshod over a state's sovereign interest in gaining control of a political subdivision that has gone out of control with multi-billion dollar implications. More particularly, the Court of Appeals simply cannot be right that, despite mismanagement by a political subdivision, the discretion of that subdivision to impose additional, future debt on the State's ratepayers is immune from a subsequent State enactment which establishes a moderate and reasonable *process* for making future decisions deeply affecting the State's citizens and does not impair existing, *substantive* financial obligations or repudiate existing debt.

The paramount need for review is heightened because this Court has decided only a handful of Contract Clause cases since its landmark decision nearly 50 years ago in

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[7] See generally, B. Wright, The Contract Clause of the Constitution (1938).

Home Bldg. & Loan Assoc. v. *Blaisdell*, 290 U.S. 398 (1934) [*"Blaisdell"*]. See *United States Trust Co.* v. *New Jersey*, 431 U.S. 1 (1977) [*"U.S. Trust"*]; *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1978) [*"Spannaus"*]. With the "revival" of the Contract Clause in *U.S. Trust* and *Spannaus* as a constitutional basis for invalidating state laws and with the prospect of increasing numbers of Contract Clause cases,[8] this action provides a vehicle for a much needed contemporary reaffirmation of those doctrines that protect state interests—some of which have their origin in the 19th Century. Moreover, the Court of Appeals decision was rendered two weeks before this Court's recent decision in *Energy Reserves Groups, Inc.* v. *Kansas Power & Light Co.*, 51 U.S.L.W. 4106 (Jan. 24, 1983) [*"Energy Reserves"*] which held a state law did not constitute a substantial impairment of contract and which used an analysis similar to the one appellant had unsuccessfully urged in the Court of Appeals. As will be demonstrated below, the Court of Appeals' decision is so at odds with the doctrines of this Court and its implications for voiding valid and necessary state laws so great that it should be either summarily reversed or vacated and remanded for reconsideration in light of *Energy Reserves*.

In the alternative, this Court should note probable jurisdiction to address unresolved constitutional questions of major significance. Most importantly, as *Energy Reserves* makes clear, there are two different applications of the ultimate, "reasonable and necessary" test under the Contract Clause—a more deferential application if the contract allegedly impaired is between a public utility and a private party and a stricter application if a state is a party to the contracts impaired. 51 U.S.L.W. at 4109. In this case, the contracts of WPPSS, as a political subdivision of the State comprised of public utilities, are much more analogous to the contracts of a public utility.

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[8] See, *e.g.*, Schwartz, *Old Wine in Old Bottles? The Renaissance of the Contract Clause*, 1979 Supreme Court Review 95.

They are not contracts of the State. *See* Part D, *infra*. Accordingly, probable jurisdiction should be noted on the fundamental constitutional question of whether the deferential or strict application of the "reasonable and necessary" test is required when the contracts allegedly impaired by State law are those not of the State but of a political subdivision which, through mismanagement, has imposed multi-billion dollar debt on the State's citizens.

A. The Court of Appeals Ignored This Court's Express Reservation Doctrine.

(1) This Court has long held that, to avoid application of the Contract Clause, states may *expressly* "reserve in their contracts and even in their constitutions the power to change their minds." L. Tribe, American Constitutional Law 470 (1978). This doctrine, first articulated in Justice Story's concurrence in the landmark case of *Trustees of Dartmouth College* v. *Woodward*, 17 U.S. (4 Wheat.) 518, 708 (1819), has been reaffirmed by this Court in an unbroken line of cases.[9] With express reservation provisions, parties who wish to contract with a state or one of its subordinate bodies are on clear notice that subsequent state law may change the terms of those contracts. The reliance interest protected by the Contract Clause, *Spannaus*, 438 U.S. at 245, is thus modified, *Atlanta* v. *Metrop. Atlanta Rapid Transit Auth.*, 636 F.2d 1084, 1092 (5th Cir. 1981), and a state's action under such a provision is subject to Due Process Clause, not Contract Clause, limitations. *Shields* v. *Ohio*, 95 U.S.

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[9] See B. Wright, The Contract Clause of the Constitution, 21-22, 58-60, 84-85, 168-178 (1938). See also, *Knoxville Water Co.* v. *Knoxville*, 189 U.S. 434 (1903); *Hamilton Gaslight & Coke Co.* v. *City of Hamilton*, 146 U.S. 258 (1892); *Greenwood* v. *Union Freight R.R. Co.*, 105 U.S. (15 Otto) 13, 17 (1881); *Tomlinson* v. *Jessup*, 82 U.S. (18 Wall.) 454, 458 (1892); *Pennsylvania College Cases*, 80 U.S. (13 Wall.) 190, 218 (1872).

(5 Otto) 319, 324-325 (1877); *Hamilton Gaslight*, n.9, *supra*, 146 U.S. at 270-71.[10]

(2) The very statutory provision that gives WPPSS the authority to issue revenue bonds contains just such an express reservation which warned BPA and the bondholders that state law could change. Section 3411 of RCW ch. 43.52 provides, in pertinent part:

> . . . *all* the provisions of law as now or *hereafter* in effect relating to revenue bonds or warrants of public utility districts shall apply to *revenue bonds* or warrants *issued by the joint operating agency* [WPPSS] including, *without limitation*, provisions relating to: . . . [(a)] the *covenants that may be contained therein and the effect thereof*; [and (b)] the execution, *issuance*, *sale*, funding, or refunding, redemption and registration *of such bonds* . . . (Emphasis supplied.)

As a law that relates to the revenue bonds of public utility districts, Initiative 394 is plainly within the clear and inclusive express reservation language of Section 3411.[11] The crux of appellee banks' case is that the Initiative impairs the covenants in the bond resolutions obligating WPPSS to issue bonds to complete the Projects.[12] But the appellee banks concede that Section 3411 is incorporated by reference in the bond resolutions and, indeed, is the legal basis for the WPPSS' obligation to issue bonds. See Banks' Brief in 9th Cir. at 27, 30. Accordingly, given the express reservation of Section 3411, their Contract Clause case may proceed no further.

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[10] *Phillips Petroleum Co.* v. *Jenkins*, 297 U.S. 629, 634-35 (1936); *Wright* v. *Minnesota Mutual Life Insurance Co.*, 193 U.S. 657 (1904). *See also, Ferguson* v. *Skrupa*, 372 U.S. 725 (1963); *East New York Savings Bank* v. *Hahn*, 326 U.S. 230, 232-33 (1945).

[11] The duties created by the Initiative apply to public utility districts. Initiative 394, § 3. Any statutory duties applicable to public utility districts are made applicable to joint operating agencies such as WPPSS through the express terms of Section 3411.

[12] See, *e.g.*, Exhibit 9, § 3.4 (Bond Resolution No. 640—Project 2).

Similarly, the crux of appellee United States' case is Section 5(a) of the Project Agreements between WPPSS and BPA which provides, in pertinent part, that

> The Supply System shall, in good faith and with due diligence, use its best efforts to issue and sell Project bonds to finance the cost of the Project and the completion thereof . . . *provided, however*, that in *each such case such Project Bonds may then be legally issued and sold.* (First emphasis in original; subsequent emphasis supplied.)[13]

Section 3411 was enacted in 1957. The Project Agreements for Projects 1-3 were executed in the early 1970s. Obviously, the drafters of Section 5(a) of the Project Agreements were aware of Section 3411, the State statute which gave WPPSS authority to issue bonds. The "provided, however" clause thus constitutes a clear warning to BPA that each and every subsequent sale of bonds following the initial sale authorized by the bond resolutions must be consistent with the subsequent law of the State of Washington. The Initiative is just such a subsequent law.

(3) Although the meaning and application of a state statute challenged under the Contract Clause is a question of Federal law, App., p. 12a, that principle does not give federal courts the power to indulge in judicial policy-making unconnected from the text of the statutes and contracts at issue. Yet, that is just what the Court of Appeals did in riding roughshod over the express reservation of Section 3411.

The Court of Appeals violates a fundamental doctrine of construction: plain meaning. It never analyzes the language of Section 3411; it, in fact, omits a crucial passage when quoting from the provision (laws hereafter in effect shall apply to the "issuance [and] sale . . . of such bonds"); and it claims to find "ambiguity" in the provision but then never bothers to explain what is ambiguous. App., p. 12a. Most importantly, without analyz-

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[13] See, *e.g.*, Exhibit 2, § 6(a) (Project Agreement No. 2).

ing the language or structure of the statute or attempting to discern any legislative history, the Court concludes that

> the effect of Section 3411 simply is to render applicable to future bond issues the requirements of state law then in existence so long as imposition of those requirements *does not modify pre-existing contracts.* *Id.*, p. 13a (emphasis supplied).

But the purpose and effect of Section 3411 is, on its face, precisely the opposite ("shall apply . . . without limitation . . . to . . . covenants . . . and the effect thereof").[14] The Court of Appeals' conclusion is simply in flat conflict with the many holdings of this Court allowing states to put parties on notice, through express reservation clauses, that contracts may be changed by future state laws and that such expressly reserved changes are subject to Due Process but not Contract Clause limitations.

The Court of Appeals' discussion of Section 5(a) of the Project Agreements between WPPSS and Bonneville is equally at odds with this Court's decisions. The Court of Appeals makes no attempt to explain how Section 5(a)'s "*provided, however*" warning can mean anything but that future sales of additional bond series were subject to changes in state law because Section 3411 requires it. Indeed, the phrase from Section 3411 omitted by the Court of Appeals ("issuance [and] sale . . . of such bonds") is, of course, tracked by Section 5(a) ("*provided, however* . . . in each such case such Project Bonds may then be legally issued and sold"). Just as with its discussion of Section 3411, the Court of Appeals can only

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[14] The State legislature wanted an express reservation because the joint agency, as a hybrid of public utilities, would be involved in the construction of larger projects using what in 1957 was considered a new technology, nuclear power, RCW 43.52.260, and because the *external* check of a state power commission on joint agencies like WPPSS in a predecessor of RCW 43.52 was abolished. *Compare*, RCW 43.52.272 with Ch. 281, 1953 Wash. Laws. See also, Exhibit 26, p. 53 (no utility rate commission check on WPPSS' financing and budgeting).

take refuge in an untenable judicial position in "construing" Section 5(a) of the Project Agreements: the language cannot mean what it says.

(4) In vitiating the Court's express reservation doctrine, the Court of Appeals also does violence to the fundamental and long-standing doctrine of the *Charles River Bridge* case that, to avoid difficult constitutional questions posed by challenges to contracts and not to encumber state governance, the contracts of state entities are to be strictly construed against plaintiffs (appellees here) in actions against a state.[15] Although this point was briefed by appellant, the Court of Appeals ignored 150 years of this Court's teaching and incorrectly cited *U.S. Trust*—which did not involve construction of an express reservation clause—in support of its clearly mistaken position that express reservation clauses should be interpreted against the state.[16] See App., p. 12a. *Cf.*, *Energy Reserves*, 51 U.S.L.W. at 4108, n.10 (statutes should be construed to avoid constitutional questions).

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[15] *Charles River Bridge* v. *Warren Bridge*, 36 U.S. (11 Pet.) 420, 543 (1837) ("[A]ny ambiguity in the terms of contracts must operate against the [plaintiff] . . ."). See also, *Northwestern Fertilizing Co.* v. *Hyde Park*, 97 U.S. 659, 666 (1878); *Keefe* v. *Clark*, 322 U.S. 393, 396-97 (1944) (case involved bond contracts of political subdivisions and any "obligation alleged to have been impaired [must] be clearly and unequivocally expressed").

[16] While acknowledging that the express reservation issue is a close question, see App., pp. 10a-13a, the Court of Appeals makes several elementary mistakes in its discussion. First, it relies on footnote 23 in *U.S. Trust*, App. p. 11a, but the case cited there stands for the proposition—not involved in this case—that *express* reservations are valid, but *implied* reservations of a state's power to repudiate debt contracts are disfavored. *Murray* v. *Charleston*, 96 U.S. 432 (1878). Second, the Court of Appeals states the "reservations are not to be lightly inferred," *id.*, p. 12a, but, again, it relies on a passage in *U.S. Trust* that does *not* deal with this Court's rules of construction involving *express* reservations. The passage instead deals with an entirely different issue regarding the limited set of circumstances under which this Court has implied a reservation of power by the State under the Reserved Powers Doctrine. 431 U.S. at 25. See Part B, *infra*.

In sum, the express reservation doctrine and the long-standing rule of construction of *Charles River Bridge* are so fundamental to the legitimate protection of the State's interests under the Contract Clause that this Court should either summarily reverse the holding of the Court of Appeals or note probable jurisdiction. See *Energy Reserves*, 51 U.S.L.W. at 4110 (an express reservation clause could "dispose of the Contract Clause claim").

B. The Court of Appeals' Decision Is In Conflict With This Court's Reserved Powers Doctrine.

(1) Even if the State had not expressly reserved the right to modify bond issuance by WPPSS, Initiative 394 would still be constitutional under the long-standing Reserved Powers Doctrine. As this Court stated in *U.S. Trust*, 431 U.S. at 23,

> [t]his doctrine requires a determination of the State's power to create irrevocable contract rights in the first place, rather than an inquiry into the purpose or reasonableness of the subsequent impairment. *In short, the Contract Clause does not require a State to adhere to a contract that surrenders an essential attribute of sovereignty.* (Emphasis supplied.)

These "reserved powers" constitute *implied* terms of all contracts entered into by a state entity. A state law within the scope of the Reserved Powers Doctrine is outside the strictures of the Contract Clause and need not be justified even if it impairs contract. *Blaisdell*, 290 U.S. at 435. Such a law is subject only to Due Process limits. This Court has long recognized that a *state's power to alter the structure of governance of its political subdivisions* is a "reserved power" and that any contractual terms limiting that sovereign power are invalid *ab initio*. *Meriwether* v. *Garrett*, 102 U.S. 472 (1880).[17]

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[17] In this seminal case, various creditors and bondholders of Memphis claimed a state law abolishing the municipality was in-

Although the scope of the Reserved Powers Doctrine has been narrowed since the late 19th Century, a state's power to alter the structure of governance of political subdivisions is at the core of the Reserved Powers Doctrine, and the decisions of this Court so holding have continuing vitality. *Cf. National League of Cities* v. *Usery*, 426 U.S. 833, 845, 851 (1976) (federal power does not deny the states the right to exercise essential "attributes of sovereignty" like structuring "integral governmental functions").

(2) Because there has been no election under the Initiative to date, 394's only present effect is to change the structure of WPPSS' governance with respect to a single decision on *future* bond issuance for each Project. In challenging the Initiative's "mere existence," appellees are thus objecting to 394's change in *the process of who shall decide*. Unlike *U.S. Trust*, which involved a state law alteration in the purposes for which revenues from bond financed facilities could be used, this case does not, at this point, involve any substantive changes by the Initiative in the financial obligations owed to bondholders or to Bonneville. *Id.*, 431 U.S. at 24. Accordingly, under the Reserved Powers Doctrine, the Initiative is outside the ambit of the Contract Clause because it only changes

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valid under the Contract Clause. This Court, in holding the Contract Clause inapplicable to such action, stated:

> Municipal corporations are mere instrumentalities of the State. . . . Their powers are such as the Legislature may confer, and these may be enlarged, abridged, or entirely withdrawn at its pleasure. . . . *All persons who deal with such bodies are conclusively presumed to act upon knowledge of the power of the legislature. There is no such thing as a vested right held by any individual in the grant of Legislative power to them.* *Id.* at 511. (Emphasis supplied.)

Of course, even a Reserved Power is subject to Due Process limitations and could not be used to avoid obligations to pay *existing* debt without compensation. See generally, Schultz, *The Effect of the Contract Clause and the Fourteenth Amendment Upon the Power of the States to Control Municipal Corporations*, 36 Mich.L. Rev. 385, 401-408 (1938).

the governing processes of WPPSS, a municipal corporation of the State. Exhibit 1, § 1(p).

(3) This Court should summarily reverse or, at the least, note probable jurisdiction because the Court of Appeals' decision is in direct conflict with the Reserved Powers Doctrine and has vitiated the essential sovereign attribute of the State to alter the structure of governance of a political subdivision. See App., p. 14a. To meet appellant's Reserved Powers argument, the Court of Appeals relied on cases cited in a footnote in *U.S. Trust. Id.* But these cases are all demonstrably inapposite because they involve State laws imposing *substantive* financial limitations which this Court itself characterized as restricting a state's "taxing power so that the [existing] debt cannot be repaid." *U.S. Trust*, 431 U.S. at 24, n.22. The Court of Appeals never came to grips with the basic fact that the Initiative has imposed no substantive limitation on WPPSS' ability to perform its financial obligations and repudiated no debt obligations. The process for making the decision about whether or not to issue *additional* bonds has simply been removed from the WPPSS' Board, which had not "exercised [its] responsibilities effectively," Exhibit 26, p. 4, and given to citizens who will bear the huge financial burden of that decision.[18]

C. The Court of Appeals' Decision Is At Odds With Appropriate Legal Standards for Determining Whether a Technical Impairment of Contract Is "Substantial" In A Constitutional Sense.

Even if there is technical impairment of contract by a state law that is not within the Reserved Powers Doctrine, a critical inquiry in Contract Clause adjudication

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[18] See also, *Fidelity Union Trust Co.* v. *New Jersey Highway Authority*, 85 N.J. 277, 426 A.2d 488, 499-500 (S.Ct. N.J. 1981), *appl. dismissed for want of subst. fed. quest.*, 102 S.Ct. 76 (1981) (alternative holding on Reserved Powers Doctrine sustaining, against bondholders' attack, State law change in governance in analogous circumstances).

> must be whether the state law has, in fact, operated as a *substantial* impairment of a contractual relationship. The severity of the impairment measures the height of the hurdle the state legislation must clear. *Minimal alteration of contractual obligations must end the inquiry . . . . Spannaus*, 438 U.S. at 244-45. (Emphasis supplied; footnote omitted.)

The decisions of this Court have yielded legal standards which must be satisfied before an impairment is "substantial" in a constitutional sense. First, an important contractual term must be substantially modified, *U.S. Trust*, 431 U.S. at 19-20, 31, *Spannaus*, 438 U.S. at 240, 246, and substantial modification may only be found if a challenged state law is a "but for" cause of a party's inability to perform its important duties. But the Court of Appeals never adopted this constitutional standard—a standard which appellees could not satisfy.[19] See App., pp. 14a-16a.

Second, and most importantly, a state law must substantially upset the legitimate expectations of the parties. *U.S. Trust*, 431 U.S. at 19-21, n.17; *Spannaus*, 438 U.S. at 246-47, 248; *Energy Reserves*, 51 U.S.L.W. at 4109-4110. In cases such as this one, the legal standard that must be met is whether the contracting parties had expectations about what would occur if circumstances dramatically changed and whether the challenged state law upset those expectations. Satisfaction of that legal standard here must first involve an inquiry into whether BPA and the bondholders had expectations when they

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[19] For example, the Initiative was not a "but for" cause of any WPPSS' delay in holding a bond sale—and the District Court did not so find—because, at the time of the District Court decision in June, 1982, Project 1 had been deferred; WPPSS stated it had enough funds to continue construction on Projects 2-3 until mid-1983; and WPPSS could thus have complied with 394's procedures long before it stated it would return to the bond markets. Exhibit 23, pp. 6-7. In addition, any substantive effects of 394 were contingent because either a "yes" or "no" vote could benefit appellees under certain circumstances. See p. 7, *supra*.

entered into the contracts that problems such as massive cost overruns, gross mismanagement and failure to conduct cost-effectiveness studies would occur. But the Court of Appeals simply failed to adopt the proper legal standard in assessing whether 394 upset the reasonable and legitimate expectations of the contracting parties, see App., p. 15a, a failure underscored by the District Court's lack of *any* finding on legitimate expectations. See App., pp. 21a-23a.

The Court of Appeals' failure on this key issue is manifest in light of *Energy Reserves*. In finding no substantial impairment, this Court stated that the parties there did not expect a major deregulation of natural gas. 51 U.S.L.W. at 4110. Similarly, the express reservation in their contracts making future state and federal law applicable meant, at the least, that the parties would not be exempt from any regulatory limitations of prices whatsoever. *Id.* Here, too, there was a major unforeseen change—WPPSS mismanagement leading to billions of dollars of cost overruns—and an express reservation in State statute to alter the law on the very obligation allegedly impaired, the obligation to issue bonds. See RCW 43.52.3411. Thus, in *Energy Reserves*, ERG could not reasonably expect no substantive changes in state regulation of prices after the unforeseen deregulation of natural gas, especially in light of an express reservation clause on price changes. Similarly, neither BPA nor the bondholders could reasonably expect that in light of WPPSS's unforeseen mismanagement and multi-billion dollar cost overruns—which the State's citizens would have to repay—that the State would not, through new law, establish a *process* for disciplining WPPSS' ability to incur *additional* indebtedness, especially in light of the express reservation on bond issuance in RCW § 43.52.3411. The Court of Appeals' analysis of the reasonable expectations of the parties, because it does not consider the circumstances presented, is in direct conflict with *Energy Reserves*.

This Court should vacate and remand for reconsideration in light of *Energy Reserves* or note probable jurisdiction because the Court of Appeals failed to apply the appropriate legal standards on the constitutional issue of "substantial" impairment.

D. The Court of Appeals' Decision Is In Conflict With This Court's "Reasonable and Necessary" Test, In Important Part, Because WPPSS Is Not The State And Greater Deference Is Due To The State's Justification For The Initiative Than Given By The Court of Appeals.

(1) Even if the "mere existence" of Initiative 394 constitutes "substantial" impairment, the Initiative is valid under the tests of *U.S. Trust*, *Spannous* and *Blaisdell* because

> [t]he Contract Clause is not an absolute bar to subsequent modification of a State's own financial obligations. As with laws impairing the obligations of private contracts, *an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose. U.S. Trust*, 431 U.S. at 25. (Emphasis supplied; footnote omitted.)

This Court should note probable jurisdiction because of the critical importance of a threshold issue in the application of this test. The Court of Appeals, citing *U.S. Trust*, premised its application of the "reasonable and necessary" test on the proposition that because "the State is a contracting party, we give less deference to its claims of justification for impairment." *See* App., p. 16a.

But the Court of Appeals is flatly wrong. In contrast to *U.S. Trust*, the State of Washington is not a party to terms of the Project Agreements and bond resolutions.[20]

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[20] For example, the Official Statements which were published with each sale of a series of Project 1-3 bonds stated explicitly in bold face type on their very first page that the Project 1-3 "bonds are not an obligation of the State of Washington or any political subdivision thereof other than the Supply System [WPPSS]." See Exhibit 24, p. 1. See also, RCW § 43.52.360.

Moreover, unlike *U.S. Trust*, the contractual provisions allegedly impaired were not enacted by the State legislature, but were entered into by WPPSS without any Statewide review. Because the Initiative sought to bring control to a political subdivision of the State that had gone out of control, this case is much more analogous to state impairment of contracts between private parties. As this Court just stated in *Energy Reserves*, quoting from *U.S. Trust*,

> [u]nless the State itself is a contracting party . . . '[a]s is customary in reviewing economic and social regulation, . . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.' 51 U.S.L.W. at 4109.

Since the State is not a party to the WPPSS' contracts allegedly impaired, the Court of Appeals' premise for its application of the "reasonable and necessary" test is major constitutional error.

In any event, whether WPPSS, as a political subdivision comprised of public utilities, is more like the State of New Jersey in *U.S. Trust* or more like Kansas Power and Light, the public utility in *Energy Reserves*—and thus whether a strict or deferential application of the reasonable and necessary test is appropriate in determining the validity of any impairment of WPPSS' contracts—is a fundamental, unresolved question of constitutional law on which probable jurisdiction should be noted. *Id.* at 4109, n.14 & 4110 (deference to Kansas law).

(2) Initiative 394 is, moreover, valid even under the strict "reasonable and necessary" test *which the Court of Appeals manifestly misapplied.* There is no dispute that the goals of the Initiative constitute "significant and legitimate" public purposes as required by *Energy Reserves*, 51 U.S.L.W. at 4109, and *U.S. Trust*, 431 U.S. at 25. As applied to Projects 1-5, the Initiative sought, *inter alia*, to ensure a vote in WPPSS' future financing decisions for ratepayers who would bear the burden of

additional, multi-billion dollar debt; to force WPPSS to consider cost-effectiveness criteria in its multi-billion dollar financing decisions; and to force WPPSS to live within stated budgets. See *Energy Reserves*, 51 U.S.L.W. at 4110 (protection of ratepayers like protection of consumers). See also, U.S. Brief in 9th Cir. at 31-32 & n.51 (concession that 394 purposes are important per *U.S. Trust*).

(3) *Initiative 394 Is Reasonable.* The "reasonableness in light of the circumstances" test has two elements. First, for a law impairing contract to be "reasonable" in a Contract Clause sense, the contract must have had consequences unforeseen by the contracting parties which created unforeseen problems of public policy. *U.S. Trust*, 431 U.S. at 31-32. The element is manifestly satisfied here as evidenced by the views, in 1981, of the Senate Inquiry, Exhibit 26, bond and appellees' analysts, Exhibits 47, 54, 56-59, 102A-C, 102E-F, 104G, and appellees' own witnesses or employees [21] that the WPPSS' construction and financing program had created economic and financial problems of crisis proportions for WPPSS, the State and its citizens and that WPPSS' mismanagement and other problems were not foreseen by the contracting parties in the early 1970s. See pp. 5-6, *supra*.

Accordingly, this case is far different from *U.S. Trust*. There, the need for funds for mass transit in the New York/New Jersey area "was not a new development. . . ." "As early as 1922, over a half century ago, there were pressures to involve the Port Authority in mass transit. *It was with full knowledge of these concerns that the 1962 covenant was adopted* [by the state legislature]." 431 U.S. at 31-32. (Emphasis supplied.) Moreover, in that case the repealed covenant had been inserted in 1962

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[21] *See, e.g.*, Squire Dep., pp. 48, 69, 91-93, CR 140, Sienkiewicz Dep., pp. 16, 30; Perko Dep., pp. 22, 37-38, 67-68, CR 141; John O'Brien Dep., p. 142, CR 146; Steele Dep., pp. 15, 21, 26, CR 167; Heck Dep., pp. 16, 18, 23-24, 31, CR 168.

to trigger the Contract Clause. *Id.* at 18. *But there is not a shred of evidence in this record—and the District Court found none—that the parties to the contracts had any knowledge, much less "full knowledge," when the contracts were executed of the problems, such as WPPSS' mismanagement, which arose directly out of those contracts—problems which were, in fact, "unintended" and which, in 1981, were creating dramatic "unforeseen" problems of public policy. Id.* at 31-32. The Court of Appeals discussion here is thus in direct conflict with *U.S. Trust.* See App., p. 20a. It can only lamely state, without any citation to the record, that the "concerns addressed by the Initiative were not unknown in the early 1970s." *Id.* But this is simply inadequate as a matter of law, since the appellees had to show that the *contracting parties* had full knowledge of the problems that gave rise to the Initiative at the time the contracts were executed, especially WPPSS mismanagement.

Second, the contract modification must be "reasonable" in light of the "changed" circumstances. To satisfy this element of the "reasonableness" test, a law impairing contract must meet a set of criteria announced in *Blaisdell* and then reaffirmed and augmented in *Spannaus.* (a) The state law must be enacted to deal with a broad, generalized economic or social problem. *Spannaus,* 438 U.S. at 250; *Blaisdell,* 290 U.S. at 444. In this case, the problems created by WPPSS mismanagement satisfy that criterion without question. The Court of Appeals cites no record evidence to dispute the number and magnitude of the problems created by WPPSS. See pp. 5-6, *supra.* (b) As an important corollary, the state law must be enacted to protect "a broad societal interest rather than a narrow class." *Spannaus,* 438 U.S. 249. In this case, this criterion is satisfied, since 394 is aimed at benefiting all the citizens of the State, and not a few employees whose pension rights are altered. *Cf., Spannaus; Energy Reserves* at n.25. The Court of Appeals does not, and cannot, rebut the findings of the State Senate Inquiry that, in 1981 when 394 was under consideration,

WPPSS threatened the State's utilities, economy and well-being of its citizens. See p. 6, *supra*. *Cf.* App., pp. 18a-19a. Moreover, under *Energy Reserves*, once there is a finding of legitimate public purpose, as there is here, then that "guarantees that the State is exercising its police power, rather than providing a benefit to special interests." 51 U.S.L.W. at 4109 & n.25. (c) The state law should, if possible, be limited in duration. *Spannaus*, 438 U.S. at 250; *Energy Reserves*, 51 U.S.L.W. at 4111. In this case, 394 meets that criterion because it requires only one vote for each Project. Initiative 394, § 4. Thus, WPPSS may issue bonds at such times and in such amounts as it deems desirable after voter approval if its cost-estimates are correct.

The Court of Appeals did not even discuss this last issue or the other "heightened reasonableness" criteria.[22] Accordingly, the Court of Appeals' decision should be summarily reversed or this Court should note probable jurisdiction because the decision below so patently misapplies the foreseeability requirement and disregards the *Blaisdell-Spannaus* criteria that are at the core of Contract Clause adjudication.

(4) *Initiative 394 is Necessary.* In addition to satisfying the "reasonableness" test, a State law that "substantially" impairs contract must also be "necessary." *U.S. Trust*, 431 U.S. at 29-30. The "necessity" test must be administered with care by the Federal judiciary because, if improperly used as it was in this case by the Court of Appeals, it can provide an unprincipled mechanism for the judiciary to substitute its own policy prefer-

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[22] *Cf.* App., p. 19a. These additional criteria are: (d) the state law must be appropriately tailored to the problems it was designed to meet; and (e) it must not modify contracts without moderation or in the spirit of oppression. *Spannaus*, 438 U.S. at 242, 250; *Blaisdell*, 290 U.S. at 445-47. Appellant showed below that 394 met these criteria. The United States did not dispute those arguments but only took the manifestly incorrect position that the *Blaisdell-Spannaus* criteria did not apply to this case. U.S. Brief in 9th Cir. at n. 59. *Cf. Energy Reserves*, 51 U.S.L.W. at 4108 & n. 11.

ences for those of the legislature or of the State's electorate as a whole acting through the initiative process. As utilized in *U.S. Trust*, the "necessity" test asks whether there was an alternative means of achieving the goals that would have been less drastic and more moderate? *U.S. Trust*, 431 U.S. at 30.[23] The Court of Appeals in a brief discussion held that the Initiative was not necessary, see App., pp. 16a-18a, but it could only do so by grossly distorting the goals of the Initiative—goals which appellees had conceded below.

(a) Section 2 of Initiative 394 expressly states that a goal of the Initiative is "to provide a mechanism for citizen review and approval of proposed financing for major public energy projects." See App., p. 26a. In other words, 394 intends that a citizens' vote shall occur because citizens will bear the ultimate cost of the additional financing. There is no less drastic means of accomplishing the goal of a citizens' vote than having a citizens' vote, and appellees suggested none below. Rather than accurately quoting the language of Section 2 of 394 or reading the uncontradicted legislative history, CR 152, the Court of Appeals distorts that goal and describes it more generally as *only* ensuring "public accountability" over WPPSS. See App., pp. 16a-17a. But this is simply impermissible—*and is an example of a willful judiciary ignoring the express language of state statute.* The Court of Appeals' ensuing discussion of alternative ways of accomplishing "public accountability" is simply without legal force or legal sense.[24]

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[23] Previous cases had generally interpreted "necessary" as "appropriate." *Blaisdell*, 290 U.S. at 444-45. See also, *Spannaus*, 438 U.S. at 242. The novel "least drastic means" formulation of *U.S. Trust* was not used in *Spannaus*. Here, in contrast to *U.S. Trust*, 431 U.S. at 29-30 & n. 28, appellees did not suggest, and the Court of Appeals did not state, that there was a "less drastic" modification of contract than the one enacted by the State.

[24] The Court of Appeals cites a State law that changes the composition of the WPPSS' Board as a less drastic alternative. But the

(b) A second goal of the Initiative, conceded by the United States, is to "require" that WPPSS consider cost-effectiveness criteria in making future financing decisions. U.S. Brief in 9th Cir. at 31-33 & n.51. See also, CR 152, ¶ 23 (Zemke Affidavit); Initiative 394, § 2. The Initiative is necessary to achievement of this goal because, as noted, at the time of its enactment WPPSS had not conducted needed cost-effectiveness studies—a fact that the Court of Appeals conveniently omits. Moreover, the Initiative's voter approval requirement is necessary because it "requires" that WPPSS, before seeking a 394 election, will consider the cost-effectiveness study mandated by the Initiative and not ignore it. Even in the face of an express concession by the United States, the Court of Appeals again distorts a goal of the Initiative. It states that "[c]ost-effectiveness studies can be required without being tied to an election requirement for the issuance of bonds previously promised." See App., p. 17a. But the Court fails to distinguish between its fallacious goal of simply requiring independent studies and the actual goal of the Initiative's drafters *of ensuring WPPSS will consider cost-effectiveness criteria.* It also fails to note that, even by the time of the District Court's ruling in June, 1982 (eight months after 394's passage), WPPSS had not even started, and BPA had not completed, cost-effectiveness studies of the Projects. Sienkiewicz Dep., pp. 74-76, 83-84, CR 142.

(c) A third goal of the Initiative, conceded by the United States is to "require WPPSS to live within stated budgets." U.S. Brief in 9th Cir. at 31-32 & n.51. The Initiative is necessary to accomplish that goal because the mere existence of the Initiative exerts budget dis-

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law cited, see App., p. 17a, was enacted in *1982*, after passage of the Initiative in November, 1981, and thus has no legal relevance to the necessity test. In addition, such Board changes are simply not a less drastic way of accomplishing the Initiative's express goal of a vote on *future* financing by *citizens* who will have to bear the additional multi-billion dollar debt.

cipline on WPPSS and because a "yes" vote establishes a debt limit that WPPSS may not exceed without another cost-effectiveness study and another election. The appellees did not even suggest a less drastic alternative for achieving this significant, legitimate goal. Refusing to accept the concession of appellee United States, the Court of Appeals' way out is to distort this goal, too. In an improper attempt to bring this case under *U.S. Trust*, the *process* goal of "imposing budget discipline" becomes the substantive goal of limiting "public spending." See App., p. 18a. But, as emphasized above, the Initiative does not, by its terms, limit spending: voters may well approve the issuance of further bonds to complete those Projects which are cost effective. What 394 does is establish a process for exerting external budget discipline on WPPSS, discipline which had been sadly lacking in the past. As to achievement of that goal, too, 394 is necessary.

Accordingly, because the Court of Appeals substituted its judgment for the judgment of the State's voters by grossly distorting 394's goals, this Court should note probable jurisdiction to establish that there are some limits on a federal court's use of "necessity" analysis to strike down state statutes.

E. The Court of Appeals' Decision Should Be Summarily Reversed Under This Court's Supervisory Power.

The District Court's summary oral findings constitute a textbook violation of Rule 52, F.R.Civ.P. (In a bench trial a District Court "shall find the facts specially and state separately its conclusions of law thereon."). It has been black letter law for forty years that broad and conclusory findings which do not reveal the basic facts upon which the District Court relied fail to satisfy the dictates of Rule 52. See App., pp. 21a-23a. *Schneiderman* v. *United States*, 320 U.S. 118, 129-131 (1943); Wright & Miller, 9 Federal Practice and Procedure, §§ 2571, 2579

(1971). Despite more than 80 pages of proposed findings by appellants, the District Court simply made no findings of "basic" facts, *inter alia*, on the legislative history of 394, the nature of any injury to any security interest, the reasonable expectations of the parties and, perhaps most importantly, the so-called "Prudent Utility Practice" standard of the contracts on which appellees rested their case.

Appellant raised the Rule 52 violation in its appellate brief (at pp. 19-21). But the Court of Appeals, rather than remanding for further findings, violated the appellate function by making findings on issues of fact that were in dispute. Most importantly, although appellees' case rested on the view that under the contracts WPPSS and BPA had to follow "Prudent Utility Practice" (PUP) in deciding whether to issue bonds and that the voters were not so bound in a 394 election, appellants introduced substantial evidence that the PUP "standard" was "impotent" and that WPPSS and BPA had not followed it, in any event, by their failure, *inter alia*, to conduct cost-effectiveness studies.[25] The meaning, if any, of the contracts' PUP standard—whether in this context it was "important" in a constitutional sense let alone "substantially modified" with no 394 election scheduled or held—was a major issue of factual dispute. But the District Court never even mentioned this concept, App., pp. 21a-23a, and the Court of Appeals improperly resolved the factual dispute without even citing to the extensive record on the issue. See, App., p. 4a, n.4.

The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, and has so far sanctioned such a departure by a lower court,

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[25] *See, e.g.*, Exhibit 110, Answer #27, Exhibit 34, p. 7, Bates Dep., pp. 56-57, 63-64, CR 132; Hoberg Dep., pp. 35, 98, 103-106; Sienkiewicz Dep., p. 95, CR 142; Akridge Dep., pp. 38, 40-50, 75, CR 149.

as to call for an exercise of this Court's supervisory power. *Cf.* Rule 17.1(a), Rules of the Supreme Court. If careful litigation of novel and important constitutional issues is to have meaning, the Court of Appeals' cavalier disregard for the record—including the legislative history of 394—must not be allowed to stand.

CONCLUSION

For the reasons stated above, this Court should either summarily reverse the decision of the Court of Appeals, vacate and remand for reconsideration in light of *Energy Reserves* or note probable jurisdiction.

Respectfully submitted,

STIMSON BULLITT
RIDDELL, WILLIAMS, BULLITT & WALKINSHAW
4400 Seattle-1st National Bank Building
Seattle, Washington 98154
206/634-3600

BENJAMIN W. HEINEMAN, JR.*
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
202/429-4000

Counsel for the Don't Bankrupt Washington Committee, Intervenor-Appellant

Dated: February 25, 1983

* Counsel of Record

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. CA 82-3404

No. DC 82-395(V)T

CONTINENTAL ILLINOIS NATIONAL BANK and TRUST COMPANY OF CHICAGO, *et al.*,
Plaintiffs/Appellees,

-vs-

THE STATE OF WASHINGTON, *et al.*,
Defendants/Appellants,

THE DON'T BANKRUPT WASHINGTON COMMITTEE,
Intervenor/Appellant

UNITED STATES OF AMERICA,
Plaintiff/Appellee,

-v-

THE STATE OF WASHINGTON, *et al.*,
Defendants/Appellants,

THE DON'T BANKRUPT WASHINGTON COMMITTEE,
Intervenor/Appellant.

Jan. 11, 1983

Appeal from the United States District Court for the Western District of Washington
Honorable Jack E. Tanner, District Judge, Presiding
Argued and Submitted November 10, 1982

Before: WRIGHT, ANDERSON, and CANBY, Circuit Judges

OPINION

CANBY, Circuit Judge:

This case involves a challenge to the constitutionality of the Washington State Energy Financing Voter Approval Act, 1981 Wash. Laws (2d. Ex. Sess.) ch. 6 ("Initiative 394"), as applied to three nuclear power plants currently under construction. The initial challenge was brought by three banks[1] serving as trustees for holders of bonds previously issued to finance the construction of these projects. The Don't Bankrupt Washington Committee ("Committee"), the original proponent of Initiative 394, was permitted to intervene. The United States then filed suit challenging the Initiative on behalf of the Bonneville Power Administration ("BPA"). The Committee was also permitted to intervene in that action and the two cases were consolidated.

Plaintiffs argued that Initiative 394 violated various provisions of the federal and state constitutions. The district court held that the Initiative unconstitutionally impaired existing contractual obligations to finance and complete three nuclear power plants under construction. U.S. Const. Art. I, § 10. It did not reach the additional contentions presented. We affirm.

BACKGROUND

BPA is a federal agency charged with marketing the power produced from federal hydroelectric projects in the Columbia River Basin to 147 customers in the Pacific Northwest. In the 1960's, BPA was faced with rapidly

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[1] Morgan Guaranty Trust Company of New York is bond fund trustee for bondholders of Project 1. Continental Illinois National Bank and Trust Company of Chicago is trustee for bondholders of Project 2. Seattle-First National Bank is trustee for bondholders of Project 3.

increasing demand for power and concluded that it would be unable to meet the future needs of its customers from existing facilities. As a result, BPA embarked upon a program under which certain of its customers were to build and operate the additional power plants needed to meet the anticipated demand. One segment of the program provided for BPA's "preference customers" (public utilities and cooperatives) to construct power projects that would be integrated into BPA's system without BPA's owning or operating the projects.

The Washington Public Power Supply System ("WPPSS") is the builder of three nuclear power plants to be operated by it as part of the BPA program. WPPSS is a municipal corporation of the State of Washington known as a "joint operating agency." [2] It is comprised of 19 public utility districts and 4 municipalities, all of which are also political subdivisions of the State. During the early 1970's WPPSS entered various agreements to enable it to build and operate the plants. Those agreements and the provisions of state law in existence at the time they were executed contain the obligations of contract allegedly impaired by Initiative 394. The agreements fall into three categories.

The first category consists of project agreements between BPA and WPPSS governing the construction and operation of each of the three plants.[3] The project agree-

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[2] WPPSS was created in 1957 pursuant to Wash. Rev. Code § 43.52.360 which provides, in part:

> Any two or more cities or public utility districts or combinations thereof may form an operating agency (herein sometimes called joint operating agency) for the purpose of acquiring, constructing, operating and owning plants, systems and other facilities and extensions thereof, for the generation and/or transmission of electric energy and power. Each such agency shall be a municipal corporation of the state of Washington with the right to sue and be sued in its own name.

[3] There is also an ownership agreement for project Number 3.

ments allow BPA to oversee certain aspects of construction including budgets and termination. BPA is authorized to disapprove "significant action" taken by WPPSS if BPA concludes that the action is inconsistent with "Prudent Utility Practice."[4] If WPPSS and BPA are unable to agree on the proposed action, the matter is referred to an independent "project consultant." The project consultant is authorized to resolve the dispute in accordance with the Prudent Utility Practice standard. There is little doubt that a decision not to finance the projects through to completion would be a "significant action" subject to disapproval if it did not meet the Prudent Utility Practice standard. In addition, the project agreements specifically obligate WPPSS to "use its best efforts to issue and sell bonds to finance the costs" of construction of each plant.

The second category of agreement entered by WPPSS consists of "Net Billing Agreements" between WPPSS, BPA and other "participants," who are BPA customers. Like the project agreements, the Net Billing Agreements require WPPSS to construct and operate the plants in accordance with Prudent Utility Practice. They also make

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[4] "Prudent Utility Practice" is defined in the project agreements as:

> any of the practices, methods and acts, which, in the exercise of reasonable judgment in light of the facts (including but not limited to practices methods and acts engaged in or approved by a significant portion of the electrical utility industry prior thereto) known at the time the decision was made, would have been expected to accomplish the desired result at the lowest reasonable cost consistent with reliability, safety and expedition.

Defendants argue that Prudent Utility Practice is a non-standard. The standard is quite flexible. The project agreements further state that "Prudent Utility Practice is not intended to be limited to the optimum practice, method or act, to the exclusion of all others, but rather to be a spectrum of possible practices, methods or acts." We need not attempt to define its contours. It is sufficient to note that it is the standard to which the parties agreed.

each participant liable for a share of the construction and financing costs of the project equal to that participant's share of anticipated power output. Under the agreements, the participants assign their share of anticipated output to BPA in return for credit for an equal amount of power on their wholesale bill from BPA. BPA in turn assumes each participant's obligation to pay its share of the construction and financing costs of the project. The result of the Net Billing Agreements, then, is that BPA receives essentially all the power[5] to be produced by the three plants, and undertakes to pay the construction and financing costs of the projects whether or not any power ultimately is produced by the plants. Those costs BPA would presumably pass on to its ratepayers throughout the Northwest. This obligation of BPA to pay the costs of constructing the plants regardless of output makes the protections of the project agreements extremely important to BPA. The project agreements enable BPA to prevent a termination of construction by WPPSS unless that termination is consistent with Prudent Utility Practice.

The third category of agreement entered by WPPSS consists of promises to bond purchasers, made in the form of bond resolutions and the state statutes giving them effect. WPPSS issued revenue bonds, payable solely from the income derived by WPPSS from its ownership and operation of the power plants.[6] The bond resolutions assured bondholders that WPPSS was "duly authorized under all applicable laws to create and issue the bonds and to adopt [the resolutions]." The authorizing section of the resolutions permitted the issuance of future bonds

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[5] BPA will receive only 70% of the power from one of the plants (Number 3) at issue here because the remaining 30% is owned by nonparticipants.

[6] The bond resolutions stated that the bonds were revenue bonds to be paid solely from "income, revenues, receipts and profits derived by the Supply System through the ownership and operation by it of the project."

"in such amounts and from time to time as may be required to pay the costs of construction." The resolutions contain covenants by WPPSS that it would "take all lawful measures required to issue and sell" the additional bonds required to complete the project. WPPSS also agreed to "use its best efforts to issue and sell Bonds to finance the costs of the project and the completion thereof." It covenanted that it would "proceed with all reasonable diligence to and will construct to completion the project and complete such construction at the earliest practical time."

WPPSS' promises to use best efforts to sell bonds and to proceed with diligence to completion are important to the bondholders, of course, because the bonds are payable from revenues produced by operation of the plants. It is true that the bondholders are also protected by BPA's obligation under the Net Billing Agreements to pay the costs of construction including its financing, but that fact does not render the promises of completion unimportant to the bondholders. Sale of power is still an important source of repayment of the bonds. The bond resolutions themselves recognized that operation of each project is "essential to the payment and security of the Bonds."

INITIATIVE 394

Initiative 394 was enacted at the Washington general election of November 3, 1981, in response to cost overruns and construction delays at five [7] nuclear power plants then under simultaneous construction by WPPSS.[8] Initiative

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[7] Two additional plants were begun after the three noted earlier. BPA was not involved in those projects and work on them has been halted for the time being.

[8] The original total estimated cost for all five WPPSS projects was approximately $4 billion. As of May 1981 the estimated total cost for the five projects was $24 billion. The original estimate for the three plants at issue here was $1.9 billion. As of May 1981 the estimated total cost for those three plants was $12 billion.

394 applies only to future projects and those projects still under construction as of July 1, 1982, that have exceeded their first official agency budget estimates by more than 200%. All three WPPSS power plants at issue here fall into the latter category.

The heart of the Initiative is contained in section 4. That section provides that no public agency may issue or sell bonds to finance construction or acquisition of any major public energy project "unless it has first obtained authority for the expenditure of the funds to be raised by the sale of such bonds for that project at an election" conducted in accordance with the Initiative.[9] Other provi-

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[9] The major provisions of Initiative 394 are the following:

New Section. Sec. 2.

The purpose of this chapter is to provide a mechanism for citizen review and approval of proposed financing for major public energy projects. The development of dependable and economic energy sources is of paramount importance to the citizens of the state, who have an interest in insuring that major public energy projects make the best use of limited financial resources. Because the construction of major public energy projects will significantly increase utility rates for all citizens, the people of the state hereby establish a process of voter approval for such projects.

New Section. Sec. 3.

The definitions set forth in this section apply throughout this chapter unless the context clearly requires otherwise.

* * * *

(2) "Major public energy project" means a plant or installation capable, or intended to be capable, of generating electricity in an amount greater than two hundred fifty megawatts. Where two or more such plants are located within the same geographic site, each plant shall be considered a major public energy project. An addition to an existing facility is not deemed to be a major energy project unless the addition itself is capable, or intended to be capable, of generating electricity in an amount greater than two hundred fifty megawatts. A project which is under construction on July 1, 1982, shall not be considered a major public energy project unless the official agency budget or estimate for total construction costs for the project as of July 1, 1982, is more than two hundred percent

sions of the Initiative require the public agency to hire an independent consultant to prepare a draft cost-

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of the first official estimate of total construction costs as specified in the senate energy and utilities committee WPPSS inquiry report, volume one, January 12, 1981, and unless, as of July 1, 1982, the projected remaining costs of construction for that project exceeds two hundred million dollars.

* * * *

New Section. Sec. 4.

No public agency or assignee of a public agency may issue or sell bonds to finance the cost of construction or the cost of acquisition of a major public energy project, or any portion thereof, unless it has first obtained authority for the expenditure of the funds to be raised by the sale of such bonds for that project at an election conducted in the manner provided in this chapter.

New Section. Sec. 5.

The election required under section 4 of this act shall be conducted in the manner provided in this section.

* * * *

(4) Prior to an election under this section, the applicant shall submit to the secretary of state a cost-effectiveness study, prepared by an independent consultant approved by the state finance committee, pertaining to the major public energy project under consideration. The study shall be available for public review and comment for thirty days. At the end of the thirty-day period, the applicant shall prepare a final draft of the study which includes the public comment, if any.

* * * *

New Section. Sec. 7.

A request for financing authority pursuant to this chapter shall be considered approved if it receives the approval of a majority of those voting on the request.

* * * *

New Section. Sec. 11.

Section 8 of this act shall take effect immediately. The remainder of this act shall take effect on July 1, 1982. Public agencies intending to submit a request for financing authority under this act are authorized to institute the procedures specified in section 5(4) of this act prior to the effective date of this act.

Filed January 20, 1981.

effectiveness study, followed by a period of public comment and issuance of a final draft study. The election then is held and voters within the districts encompassed by the agency and its members are entitled to vote. Bonds may not be issued in excess of the amounts of funds authorized by the voters and, of course, if the proposal is voted down no bonds may issue at all.

The Initiative alters WPPSS's functioning in two ways. Prior to the Initiative's enactment there was no explicit requirement that WPPSS obtain cost-effectiveness studies for its projects. Arguably, however, such studies were encompassed in the "Prudent Utility Practice" standard which governed both WPPSS's operation and BPA's limited oversight of WPPSS. A more important change arises from the fact that the only pre-Initiative statute governing WPPSS' bond issuing authority was Wash. Rev. Code § 43.52.3411. That statute authorized WPPSS to issue bonds payable from the revenues of the utility projects whenever its board deemed it advisable. Initiative 394 accordingly imposes a substantial new hurdle to the sale of bonds essential to WPPSS' completion of the three plants. Plaintiffs argue that by conditioning WPPSS's ability to issue bonds on the outcome of a popular referendum, Initiative 394 impermissibly impairs WPPSS's obligations under the project agreements, the Net Billing Agreements, and the bond resolutions.

CONTRACTS CLAUSE

Article I, Section 10, Clause 1 of the United States Constitution provides: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . ." To determine whether Initiate 394 violates the contract clause, we must address two major issues. First, we must determine whether the Initiative substantially impairs WPPSS's contractual obligations to BPA or the bondholders. Second, we must determine whether the Initiative, if it substantially impairs those obligations, is

nevertheless justified as a reasonable and necessary exercise of the State's sovereign power. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978); *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977).

IMPAIRMENT

Defendants argue that Initiative 394 did not substantially impair any of WPPSS's contractual obligations. Conceding that the Initiative does alter WPPSS's ability to issue bonds, they contend that the possibility of such an alteration was contemplated at the time the agreements were made. If in fact the contracts in question did allow for such an alteration, then the Initiative does not substantially impair them. *See Northwestern Nat'l Life Ins. Co. v. Tahoe Regional Planning Agency*, 632 F.2d 104, 106 (9th Cir. 1980). We do not agree, however, that the contracts can reasonably be read as contemplating the kind of alteration of WPPSS's bonding authority effected by Initiative 394.

Defendants point to the provision of the bond resolutions in which WPPSS covenanted to "take all *lawful* measures required to issue and sell" the additional bonds (emphasis added). They also rely on the provision of the project agreements that promises that WPPSS will use its best efforts to sell bonds to finance completion provided "that in each case such Projects Bonds *may then be legally issued and sold*" (emphasis added). We realize that the defendants' arguments, particularly with regard to the latter provision, are not without force. We nevertheless believe that both provisions may be read most reasonably as promises of compliance with regular and broadly applicable bonding requirements of the state for the issuance of bonds. It is less reasonable to interpret them as leave for the state to impose a more narrowly targeted requirement of success in a popular referendum as a condition for further bonding authority by WPPSS.

We confess that our conclusion is influenced by what we perceive as the central aspect of the agreements before us. The contracting parties agreed at the outset that additional power resources were needed. The object of the agreements was to provide those resources. WPPSS recognized the importance of completion to BPA [10] and the bondholders,[11] and BPA agreed in effect to repay the bonds regardless whether the plants were completed. The bondholders therefore had a promise of payment even without the plants, but completion of the plants unquestionably will make more energy available to finance repayment. WPPSS agreed to finish the plants with all reasonable diligence, which it clearly cannot do without issuing more bonds. In a very practical sense, the promise of completion was the only consideration BPA received for agreeing to pay the construction and financing costs. Its entitlement to the energy produced—BPA's sole benefit from the entire set of agreements—is renderd valueless if the plants are not completed. WPPSS's ability to issue additional bonds was accordingly the centerpiece of the entire arrangement. We have difficulty reading the provisions of the contracts in a way that permits destruction of their primary purpose. A promise in a contract that gives one party the power "to deny or change the effect of the promise, is an absurdity." *United States Trust Co. v. New Jersey*, 431 U.S. at 25 n. 23 (quoting *Murray v. Charleston*, 96 U.S. 432, 445 (1877)).

Defendants also contend that there is no impairment because of Wash. Rev. Code 43.52.3411 ("Section 3411"), the statute that authorizes agencies such as WPPSS to issue bonds. That statute provides that, with one exception not relevant here, "all the provisions of law as now

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[10] The project agreements recite that the generating capacity of the plants would assist BPA in attaining the objectives of the Bonneville Power Act.

[11] The bond resolutions recognized that operation of each project was "essential to the payment and security of the bonds."

or hereafter in effect relating to revenue bonds or warrants of public utility districts shall apply to revenue bonds or warrants issued by the joint operating agency including, without limitation, provisions relating to: . . . the time and place of payment of such bonds or warrants and the interest rates or rates thereon; the covenants that may be contained therein and the effect thereof . . . ." Defendants focus on the words "now or hereafter" and contend that Section 3411 constitutes a reservation of state authority to make the changes imposed by Initiative 394. In our view, this contention overreads the statute.

The meaning and application of a state statute that is challenged as violating the contracts clause is a question of federal law. *Coombes v. Gertz*, 285 U.S. 34, 441 (1932); *see American Toll Bridge Co. v. Railroad Comm'n*, 307 U.S. 486, 490 (1939); *Rapid Transit Corp. v. New York*, 303 U.S. 573, 593 (1938). That rule necessarily extends to Section 3411 insofar as that statute dictates the application of Initiative 394 to the contracts in issue here.

The provisions of Section 3411 relied upon by defendants to establish a reservation of state power to modify contracts are ambiguous. The State has on occasion enacted statutes which explicitly exempted or subjected bond issues to the effects of subsequently enacted laws. *Compare* Wash. Rev. Code § 53.34.120 (state covenants not to limit or alter vested rights of certain specified bondholders) *with* Wash. Const. art. XII, § 1 (all laws relating to corporations may be altered at any time). Defendants argue that any ambiguity in the provisions at issue here should be resolved in favor of the State. We cannot agree. Although contracts which affect the public interest are interpreted so as to favor the State, when the State borrows money the State is not acting entirely in its sovereign capacity. Thus, insofar as the purely financial aspects of the agreement are concerned, reservations are not to be lightly inferred. *United*

States Trust v. New Jersey, 431 U.S. at 25 n. 23; *see Restatement (Second) of Contracts* § 207 comment a.

We conclude that the effect of Section 3411 simply is to render applicable to future bond issues the requirements of state law then in existence so long as imposition of those requirements does not modify pre-existing contracts. We do not read it as a reservation of power applicable to the contracts at issue here. While the State unquestionably may reserve power to change some aspects of existing contracts, *see Atlanta v. Metropolitan Atlanta Rapid Transit Authority*, 636 F.2d 1084 (5th Cir. 1981), the State has not specifically done so here. Moreover, to interpret Section 3411 as a broad reservation of power is not permissible when the statute is viewed in light of of the contract clause. For example, Section 3411 could not sensibly be construed to permit the State to change by law the interest rates or redemption schedules applicable to previously issued bonds. *See United States Trust Co. v. New Jersey, supra*, 431 U.S. at 27-28. Section 3411 therefore cannot be applied as broadly and retrospectively as its literal language may suggest. It is a closer question whether it can be applied to allow the State to restrict a future bond issue in a manner contrary to the provisions of pre-existing contracts. We conclude that it cannot be so applied, at least in the direction dictated by Initiative 394. Section 3411 may doubtless apply many of the technical requirements of the State's bond laws to bonds issued by WPPSS in the future. Initiative 394 may itself be applied, so far as the contract clause is concerned, to future bond issues for projects not subject to the contractual constraints binding the projects in issue here. But Section 3411 does not, in our view, reserve to the State the power to apply Initiative 394 to the additional bond issues of WPPSS that were promised in the contracts before us, and that remain central to the accomplishment of their purpose.

Defendants argue that Initiative 394 did not simply affect financial obligations. They contend that it altered the structure of governance of one of the State's political subdivisions, an act inherently within the sovereign's power. The Initiative did alter the type of control the electorate could exercise over WPPSS. But the voters always had ultimate control, direct or indirect, over WPPSS by the power to elect its board. The Initiative simply altered the manner in which WPPSS can raise money. The new method does involve voter approval, but it is still the method of financing that is being altered.

Defendants also argue that a municipal corporation, such as WPPSS remains subject to state regulation and cannot be allowed to contract itself out from state control. That argument misperceives the nature of the restriction on state action imposed by the contract clause. As a creature of the state a municipal corporation derives its power from the legislature. Once having granted certain powers to a municipal corporation, which in turn enters into binding contracts with third parties who have relied on the existence of those powers, the legislature (or here, the electorate) is not free to alter the corporation's ability to perform. *Louisiana ex rel. Hubert v. New Orleans*, 215 U.S. 170, 175-78 (1909); *Wolff v. New Orleans*, 103 U.S. 358, 365-68 (1880); *see United States Trust*, 431 U.S. at 24 n. 22. WPPSS remains subject to state regulation, but if the State significantly alters WPPSS's ability to perform previously negotiated agreements, it impairs obligations of contract.

Since we have concluded that neither the contracts themselves nor Wash. Rev. Code 43.52.3411 permit the state to modify the contractual obligations along the lines dictated by Initiative 394, we must next address the question whether Initiative 394 constitutes a substantial impairment of those obligations. It largely follows from what has already been said that the impairment is substantial. The issuance of additional bonds by WPPSS is

essential to the performance of its contracts; it is particularly crucial to the obligation running from WPPSS to BPA. Prior to Initiative 394, the issuance of additional bonds was within the discretion of the board of directors of WPPSS. BPA had the right to ensure that the discretion was exercised in accordance with Prudent Utility Practice. An abandonment of the project was consequently likely to occur only if events caused such abandonment to be in BPA's interests as a distributor of power. Initiative 394 adds a new and unpredictable element. Bonds necessary for completion of the projects can only be issued after approval of the proposed expenditure of the proceeds by the electorate at a popular referendum. No standard can be imposed on the electorate in exercising its decision, nor can it be subjected to any review. It can reject the proposal for any reason or no reason. The addition of the referendum requirement is, we conclude, a severe impairment that defeats the expectations of the parties under their contracts. *See Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978).

Nor do we view Initiative 394 as an insubstantial impairment prior to the time that the voters actually turn down a proposed bond issue. Defendants argue that the district court made inadequate findings to support its conclusion that the very existence of Initiative 394 injured plaintiffs by lowering the market value of WPPSS bonds and thereby increasing the costs of construction. They also contend that there was no real loss to the bondholders because they still have BPA's promise of payment. We need not fix with certainty, however, any loss in value of bonds caused by the existence of Initiative 394. It is sufficient that the additional requirements imposed by Initiative 394 impair the ability of WPPSS to carry out its covenants in the manner originally promised. *United States Trust Co. v. New Jersey, supra*, is conclusive on that point. In that case, the Supreme Court held that the fact that the bondholders' security provision impaired by the state was of little value was irrelevant to the con-

stitutional determination. Absent the payment of just compensaion, the repeal of a particular security provision impaired an obligation of contract even though the bondholders might have retained other contractual security. 431 U.S. at 18-19. As in *United States Trust*, the covenants at issue here were not superfluous. Plaintiffs were promised financing of the plants to completion, subject only to contractually specified conditions. That promise was clearly an inducement to contract. *Cf. El Paso v. Simmons*, 379 U.S. 497 (1965) (unlimited redemption period could be changed by statute to five year redemption period when original provision was not an inducement to contract). Plaintiffs were not compensated for modification of that central provision. Initiative 394 impairs the obligation by imposing the election requirement, and that requirement is a present injury not dependent on the outcome of such an election.

JUSTIFICATION

Having concluded that Initiative 394 does impair WPPSS's contractual obligations, we must determine whether the degree of that impairment is both reasonable and necessary to achieve a valid state interest. *United States Trust, supra* 431 U.S. at 29. Our determination whether the State's action is justified is affected by the fact that WPPSS is itself a political subdivision of the State, made up of other political subdivisions. We cannot view the contracts between WPPSS and the plaintiffs as those between private parties. Because the State is a contracting party, we give less deference to its claims of justification for impairment. *Id.* at 25-26.

We emphasize that the State has not attempted to justify Initiative 394 as an exercise of the State's sovereign prerogative to protect the health and safety of its citizens. Considerations of health and safety did not give rise to the Initiative, and are not offered in justification of it. Instead, defendants propose five public

purposes served by Initiative 394. Essentially the five reduce to three related goals: ensuring WPPSS's public accountability; ensuring public accountability in all decisions affecting the energy and economic future of the State; and protecting the State's finances by placing controls on WPPSS's spending.[12]

Achievement of public accountability is certainly a legitimate public purpose. It is not clear, however, that Initiative 394 is either reasonable or necessary to achieve it. The Initiative was not necessary to give the public control over either WPPSS or energy and economic decision-making generally. Through the election process, the voters have always had direct or indirect control of both. At least one alternative method of achieving public accountability has actually been adopted. *See, e.g.*, 1982 Wash. Laws (1st Ex. Sess.) ch. 43 (requiring joint operating agencies to form executive boards with outside membership). Others remain available. Cost effectiveness studies can be required without being tied to an election requirement for the issuance of bonds previously promised.[13] The existence of such alternative means of

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[12] At oral argument plaintiffs attempted to justify the Initiative in part because the large amounts of bonds issued by WPPSS had made it difficult for the State to sell its own bonds. Protecting the marketability of state-issued bonds is a valid state purpose, but the contract clause was intended to ensure that the State pursues that purpose in an evenhanded manner. Initiative 394 does not attempt to limit all private borrowing; its retroactive effect is limited to altering WPPSS's ability to issue bonds. The State's argument emphasizes the fact that the State is attempting to protect its fund-raising power by limiting WPPSS's obligation to finance its projects. *See United States Trust*, 431 U.S. at 26.

[13] Initiative 394 contained a cost effectiveness study requirement. Despite the existence of a severability clause (Section 10) the District Court held that the statute was not severable and invalidated the entire Initiative. We do not address the correctness of that holding because counsel have represented to the court that WPPSS has already undertaken to obtain cost effectiveness studies for the three projects currently under construction. Inasmuch as

achieving accountability cast doubt on the validity of Initiative 394's application to the obligations in issue here. *See United States Trust Co.*, 431 U.S. at 29-31 & n. 28. *Cf. El Paso v. Simmons*, 379 U.S. 497, 516-17 (1965) (retroactive application "quite clearly necessary" to achieve state's purpose.).

Limitation of public spending is also certainly a legitimate state goal, but its weight is diminished in contract clause analysis when the state limits its own previous financial commitments. As the Supreme Court declared in *United States Trust*:

> [C]omplete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State reduced its financial obligations whenever it wanted to spend the money for what it regarded was an important public purpose, the Contracts Clause would provide no protection at all.

431 U.S. at 26 (footnote omitted). These words are no less applicable when the purpose of an impairment is merely saving money, as here, rather than spending it for a broad public purpose (mass transportation) as in *United States Trust*. Reduced to bare essentials, the State's financial argument in support of Initiative 394 is that completion of the projects as contracted by WPPSS had become too expensive.

Even in the light of the severe cost overruns and lengthy construction delays associated with the WPSS projects, Initiative 394 does not appear to be a reasonable measure if applied to the contracts before us. The Initiative seems somewhat narrowly targeted to modify

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the contracts clause challenge goes only to the statute's retroactive application to existing obligations, the severability issue is moot.

those very contracts, rather than being part of a broad public program with incidental impairing effects. In *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978), the Supreme Court invalidated a statute that altered the pension plan liabilities of employers who either terminated a pension plan or closed a Minnesota office. The statute, intended to protect discharged workers, essentially required the employer to assure all employees of at least ten years standing a full pension regardless of the vesting provisions of any existing plan. Stressing the fact that the severe disruption of contractual obligations was unexpected and served only a relatively narrow public interest, the Court held that not even the presumption favoring legislative judgments as to necessity and reasonableness could save the act.

The *Spannaus* Court contrasted the facts of *Home Building & Loan Ass'n. v. Blaisdell*, 290 U.S. 398 (1934), in which a temporary provision extending mortgage redemption periods was upheld. That emergency measure, enacted in response to the economic conditions of the 1930's, protected a basic societal interest rather than a favored group. Moreover, it imposed reasonable conditions, many of which were designed to protect the creditors whose rights were affected.

Defendants argue that unlike *Spannaus* this case involves an area historically regulated by the State and that state regulation altering contractual obligations was therefore foreseeable. It is true that the State has historically regulated power production and the operation of its political subdivisions. The State's regulation is not necessarily more foreseeable, however, than state regulation of a port authority and mass transportation involved in *United States Trust, supra*, where the State's impairment of bond obligations was nevertheless struck down.

Plaintiffs argue that the cost overruns and delays which prompted passage of the Initiative were of such a mag-

nitude as to compare with the economic conditions present in *Blaisdell*. We cannot agree. The concerns addressed by the Initiative were not unknown in the early 1970's. In *Blaisdell* the State, acting in its sovereign capacity adopted a balanced and temporary measure designed to protect broad societal interests which were threatened by the unforeseeable collapse of the world economy. In contrast, Initiative 394 sacrifices the interest of parties to contracts with the State's subdivision in order to protect the State's own finances. We cannot conclude that this imposed sacrifice was reasonable in light of changed circumstances. *Compare United States Trust*, 431 U.S. at 31-32 with *El Paso v. Simmons*, 379 U.S. at 515.

We therefore hold that the contract clause of the United States Constitution prohibits the application of Initiative 394 to the three WPPSS projects at issue in this appeal. Our disposition makes it unnecessary to address other grounds urged by plaintiffs in support of the district court's decision. The judgment of the district court is AFFIRMED.

[1] IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

No. C82-94

Consolidated with
No. C82-395V

CONTINENTAL ILLINOIS NATIONAL
BANK & TRUST CO. OF CHICAGO, *et al.*,
Plaintiff,

-vs-

STATE OF WASHINGTON, *et al.*,
Defendant.

TRANSCRIPT OF PROCEEDINGS beginning on Monday, June 28, 1982, at 9:00 o'clock, a.m., at Tacoma, Washington, before the Honorable Jack E. Tanner, a United States District Judge. . . . .

* * * *

[Excerpts of Transcript of June 29, 1982 follow.]

[p. 233] [JUDGE TANNER:] I now turn to the disputed findings of fact [p. 224] that commence on Page 30 of the amended pretrial order. The plaintiff trustees contend that they are authorized to bring this action on behalf of the holders of bonds sold to finance construction of Projects 1, 2, and 3. I have already made that finding, that they have standing. The plaintiff trustees contend that Initiative 394 has injured bondholders of Projects 1, 2, and 3 bonds by among other things (a) immediately impairing their contractual rights, (b) reducing the security for their bonds, (c) creating uncertainty as to the

ability of the Supply System to finance the completion of each project, and (d) reducing the value of their bonds on the secondary market. I find that the evidence supports those contentions of the trustees by a preponderance of the evidence.

Turning now to Page 31 of the disputed facts of the amended pretrial order, the plaintiff United States contends that Initiative 394 has injured Bonneville by, among other things, (a) immediately impairing its contractual rights, (b) substantially increasing the risk assumed by Bonneville under the various contracts relating to Projects 1, 2, and 3, (c) increasing the cost of constructing each project, and (d) interferring with Bonneville's statutory and contractual obligations to provide an adequate, reliable electricity supply at [p. 225] the lowest cost for its customers throughout the Pacific Northwest region. I find by a preponderance of the evidence that Bonneville, the plaintiff Bonneville's contentions are supported by the evidence, by a preponderance of the evidence.

Having then found, and I so do, that there has been an impairment of contract between the trustees, Bonneville, and the Supply System, that there is a substantial impairment, a substantial changing modifying, and outright repeal of the covenants and resolutions and the terms of the contract then existing and still in existence between the parties, and therefore there is a substantial impairment.

Now turning to the question that I must, if there is a substantial impairment, is it reasonable and necessary in the exercise of the police power of the State of Washington in view of all the facts and circumstances of this case. 394 is retroactive, which includes the contract involved in projects 1, 2, and 3. In referring to the threshold question the Court's answer to is there a valid contract between the parties in both cases, the evidence is uncontracted that there is, no dispute about that. The

question does 394 substantially impair the provisions and terms of the existing contract, the Court finds that it does. And if so, is [p. 226] the impairment permissible under Article I, Section X of the United States Constitution. The plaintiffs in this case have the burden of showing by a preponderance of the evidence the injury, the damage, and causation. I think the preponderance shows that. In reading United States Trust and applying the principles that the Supreme Court implied in that case, I should say that this Court cannot find that 394 is reasonable and necessary under the guidelines and terms set forth in the United States Trust case.

So it is the opinion of this Court that Initiative 394, now codified under 8052 of RCW 80.52 is unconstitutional as applied to Projects 1, 2 and 3. Judgment will be entered in favor of both plaintiffs in each case, and an injunction will issue in both cases enjoining defendants from applying or attempting to apply the terms of Initiative 394 against Projects 1, 2, and 3. I think that disposes of the case. . . . .

* * * *

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. CA 82-3404

No. DC 82-395(V)T

CONTINENTAL ILLINOIS NATIONAL BANK
and TRUST COMPANY OF CHICAGO, *et al.*,
Plaintiffs/Appellees,

-vs-

THE STATE OF WASHINGTON, *et al.*,
Defendants/Appellants,

THE DON'T BANKRUPT WASHINGTON COMMITTEE,
Intervenor/Appellant

UNITED STATES OF AMERICA,
Plaintiff/Appellee,

-vs-

THE STATE OF WASHINGTON, *et al.*,
Defendants/Appellants,

THE DON'T BANKRUPT WASHINGTON COMMITTEE,
Intervenor/Appellant.

NOTICE OF APPEAL TO
THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that The Don't Bankrupt Washington Committee, intervenor-appellant, appeals from the

final order declaring Initiative 394 (Washington State Energy Financing Voter Approval Act, chapter 6, 1981 Wash. Laws (2d ex. sess.)) unconstitutional under the Contract Clause of the United States Constitution. U.S. Const. Art. I, § 10, cl. 1. This order was entered on January 11, 1983.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

Respectfully submitted,

/s/ Ben W. Heineman, Jr.
BENJAMIN W. HEINEMAN, JR.
Sidley & Austin
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

/s/ Stimson Bullitt
STIMSON BULLITT
Riddell, Williams, Bullitt
& Walkinshaw
4400 Seattle-First National
Bank Building
1001 Fourth Avenue
Seattle, Washington 98154
(206) 624-3600

Dated: January 20, 1983

[Certificate of Service Omitted in Printing]

ENERGY PROJECTS—FINANCING—VOTER APPROVAL

CHAPTER 6

INITIATIVE MEASURE NO. 394

As Act relating to energy facilities; adding a new chapter to Title 80 RCW; and providing an effective date.

Be it enacted by the People of the State of Washington:

New Section. Section 1.

This chapter may be cited as the Washington state energy financing voter approval act.

New Section. Sec. 2.

The purpose of this chapter is to provide a mechanism for citizen review and approval of proposed financing for major public energy projects. The development of dependable and economic energy sources is of paramount importance to the citizens of the state, who have an interest in insuring that major public energy projects make the best use of limited financial resources. Because the construction of major public energy projects will significantly increase utility rates for all citizens, the people of the state hereby establish a process of voter approval for such projects.

New Section. Sec. 3

The definitions set forth in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Public agency" means a public utility district, joint operating agency, city, county, or other state governmental agency, entity, or political subdivision.

(2) "Major public energy project" means a plant or installation capable, or intended to be capable, of generating electricity in an amount greater than two hundred

fifty megawatts. Where two or more such plants are located within the same geographic site, each plant shall be considered a major public energy project. An addition to an existing facility is not deemed to be a major energy project unless the addition itself is capable, or intended to be capable, of generating electricity in an amount greater than two hundred fifty megawatts. A project which is under construction on July 1, 1982, shall not be considered a major public energy project unless the official agency budget or estimate for total construction costs for the project as of July 1, 1982, is more than two hundred percent of the first official estimate of total construction costs as specified in the senate energy and utilities committee WPPSS inquiry report, volume one, January 12, 1981, and unless, as of July 1, 1982, the projected remaining cost of construction for that project exceeds two hundred million dollars.

(3) "Cost of construction" means the total cost of planning and building a major public energy project and placing it into operation, including, but not limited to, planning cost, direct construction cost, licensing cost, cost of fuel inventory for the first year's operation, interest, and all other costs incurred prior to the first day of full operation, whether or not incurred prior to the effective date of this act.

(4) "Cost of acquisition" means the total cost of acquiring a major public energy project from another party, including, but not limited to, principal and interest costs.

(5) "Bond" means a revenue bond, a general obligation bond, or any other indebtedness issued by a public agency or its assignee.

(6) "Applicant" means a public agency, or the assignee of a public agency, requesting the secretary of state to conduct an election pursuant to this chapter.

(7) "Cost-effective" means that a project or resource is forecast:

(a) To be reliable and available within the time it is needed; and

(b) To meet or reduce the electric power demand of the intended consumers at an estimated incremental system cost no greater than that of the least-cost similarly reliable and available alternative project or resource, or any combination thereof.

(8) "System cost" means an estimate of all direct costs of a project or resource over its effective life, including, if applicable, the costs of distribution to the consumer, and, among other factors, waste disposal costs, end-of-cycle costs, and fuel costs (including projected increases), and such quantifiable environmental costs and benefits as are directly attributable to the project or resource.

New Section. Sec. 4.

No public agency or assignee of a public agency may issue or sell bonds to finance the cost of construction or the cost of acquisition of a major public energy project, or any portion thereof, unless it has first obtained authority for the expenditure of the funds to be raised by the sale of such bonds for that project at an election conducted in the manner provided in this chapter.

New Section. Sec. 5.

The election required under section 4 of this act shall be conducted in the manner provided in this section.

(1) (a) If the applicant is a public utility district, joint operating agency, city, or county, the election shall be among the voters of the public utility district, city, or county, or among the voters of the local governmental entities comprising the membership of the joint operating agency.

(b) If the applicant is any public agency other than those described in subsection (1) (a) of this section, or is

an assignee of a joint operating agency and not itself a joint operating agency, the election shall be conducted state-wide in the manner provided in Title 29 RCW for state-wide elections.

(2) The election shall be held at the next state-wide general election occurring more than ninety days after submission of a request by an applicant to the secretary of state unless a special election is requested by the applicant as provided in this section.

(3) If no state-wide election can be held under subsection (2) of this section within one hundred twenty days of the submission to the secretary of state of a request by an applicant for financing authority under this chapter, the applicant may request that a special election be held if such election is necessary to avoid significant delay in construction or acquisition of the energy project. Within ten days of receipt of such a request for a special election, the secretary of state shall designate a date for the election pursuant to RCW 29.13.010 and certify the date to the county auditor of each county in which an election is to held under this section.

(4) Prior to an election under this section, the applicant shall submit to the secretary of state a cost-effectiveness study, prepared by an independent consultant approved by the state finance committee, pertaining to the major public energy project under consideration. The study shall be available for public review and comment for thirty days. At the end of the thirty-day period, the applicant shall prepare a final draft of the study which includes the public comment, if any.

(5) The secretary of state shall certify the ballot issue for the election to be held under this section to the county auditor of each county in which an election is to be held. The certification shall include the statement of the proposition as provided in section 6 of this act. The

costs of the election shall be relieved by the state in the manner provided for state measures under RCW 29.13.047.

(6) Prior to an election under this section, the secretary of state shall provide an opportunity for supporters and opponents of the requested financing authority to present their respective views in a voters' pamphlet which shall be distributed to the voters of the local governmental entities participating in the election. Upon submission of an applicant's request for an election pursuant to this section, the applicant shall provide the secretary of state with the following information regarding each major public energy project for which the applicant seeks financing authority at such election, which information shall be included in the voters' pamphlet:

(a) The name, location, and type of major public energy project, expressed in common terms;

(b) The dollar amount and type of bonds being requested;

(c) If the bond issuance is intended to finance the acquisition of all or a portion of the project, the anticipated total cost of the acquisition of the project;

(d) If the bond issuance is intended to finance the planning or construction of all or a portion of the project, the anticipated total cost of construction of the project;

(e) The projected average rate increase for consumers of the electricity to be generated by the project. The rate increase shall be that which will be necessary to repay the total indebtedness incurred for the project, including estimated interest;

(f) A summary of the final cost-effectiveness study conducted under subsection (4) of this section;

(g) The anticipated functional life of the project;

(h) The anticipated decommissioning costs of the project; and

(i) If a special election is requested by the applicant, the reasons for requesting a special election.

New Section. Sec 6.

The proposition for each major public energy project listed upon a ballot pursuant to this chapter shall be in the form provided in this section.

(1) If the funds are intended to finance the planning or construction of all or a portion of the project, the proposition shall read substantially as follows:

> "Shall (name of applicant) be authorized to spend (dollar amount of financing authority requested) to construct the (name of the project) (type of project) located at (location), the anticipated total construction cost of which is (anticipated cost of construction)?"

(2) If the financing authority is intended to finance the acquisition of all or a portion of the project from another party, the proposition shall read substantially as follows:

> "Shall (name of applicant) be authorized to spend (dollar amount of financing authority requested) to acquire the (name of project) (type of project) located at (location), the anticipated total acquisition cost of which is (anticipated cost of acquisition)?"

New Section. Sec. 7.

A request for financing authority pursuant to this chapter shall be considered approved if it receives the approval of a majority of those voting on the request.

New Section. Sec. 8.

In planning for future energy expenditures, public agencies shall give priority to projects and resources which are cost-effective. Priority for future bond sales to finance energy expenditures by public agencies shall be given: First, to conservation; second, to renewable resources; third, to generating resources utilizing waste heat or generating resources of high fuel-conversion efficiency; and fourth, to all other resources. This section does not apply to projects which are under construction on the effective date of this section.

New Section. Sec. 9.

Sections 1 through 8 of this act shall constitute a new chapter in Title 80 RCW.

New Section. Sec. 10.

If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

New Section. Sec. 11.

Section 8 of this act shall take effect immediately. The remainder of this act shall take effect on July 1, 1982. Public agencies intending to submit a request for financing authority under this act are authorized to institute the procedures specified in section 5(4) of this act prior to the effective date of this act.

Filed, January 20, 1981.

Generally effective July 1, 1982; Section 8 effective December 3, 1981.

Chapter 43.52 RCW

OPERATING AGENCIES
[Pertinent Provisions]

RCW 43.52.250 *Definitions.* As used in this chapter and unless the context indicates otherwise, words and phrases shall mean: . . .

"Operating agency" or "joint operating agency" means a municipal corporation created pursuant to RCW 43.52.360, as now or hereafter amended. . . .

RCW 43.52.260 *Scope of authority.* The authority granted in this chapter shall apply equally to the generating of electricity by water power, by steam power, by nuclear power or by any other means whatsoever. . . .

RCW 43.52.272 *Power commission abolished.* The Washington state power commission is hereby abolished. . . .

RCW 43.52.300 *Powers and duties of an operating agency.* An operating agency formed under RCW 54.52.360 shall have authority:

(1) To generate, produce, transmit, deliver, exchange, purchase or sell electric energy and to enter into contracts for any or all such purposes.

(2) To construct, condemn, purchase, lease, acquire, add to, extend, maintain, improve, operate, develop and regulate plants, works and facilities for the generation and/or transmission of electric energy . . . .

RCW 43.52.3411 *Revenue bonds or warrants.* For the purposes provided for in this chapter, an operating agency shall have power to issue revenue bonds or warrants payable from the revenues of the utility properties operated by it. Whenever the board of a joint operating agency shall deem it advisable to issue bonds or warrants to construct or acquire any public utility or any works,

plants or facilities or any additions or betterments thereto or extensions thereof it shall provide therefor by resolution, which shall specify and adopt the system or plan proposed and declare the estimated cost thereof as near as may be. Such cost may include funds for working capital, for payment of expenses incurred in the acquisition or construction of the utility and for the repayment of advances made to the operating agency by any public utility district or city. Except as otherwise provided in RCW 43.52.343, all the provisions of law as now or hereafter in effect relating to revenue bonds or warrants of public utility districts shall apply to revenue bonds or warrants issued by the joint operating agency including, without limitation, provisions relating to: The creation of special funds and the pledging of revenues thereto; the time and place of payment of such bonds or warrants and the interest rate or rates thereon; the covenants that may be contained therein and the effect thereof; the execution, issuance, sale, funding, or refunding, redemption and registration of such bonds or warrants; and the status thereof as negotiable instruments, as legal securities for deposits of public moneys and as legal investments for trustees and other fiduciaries and for savings and loan associations, banks and insurance companies doing business in this state state. . . .

RCW 43.52.360 *Operating agency—Formation—Additional projects—Appeals—Membership, withdrawal—Dissolution.* Any two or more cities or public utility districts or combinations thereof may form an operating agency (herein sometimes called a joint operating agency) for the purpose of acquiring, constructing, operating and owning plants, systems and other facilities and extensions thereof, for the generation and/or transmission of electric energy and power. Each such agency shall be a municipal corporation of the state of Washington with the right to sue and be sued in its own name. . . .

Office-Supreme Court, U.S.
FILED
MAR 24 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1445

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE DON'T BANKRUPT WASHINGTON COMMITTEE, APPELLANT

v.

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, SEATTLE-FIRST NATIONAL BANK, MORGAN GUARANTY TRUST COMPANY OF NEW YORK, AND THE UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION OF APPELLEE CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO TO DISMISS OR AFFIRM

FRANKLIN P. AUWARTER*
STEPHEN M. SHAPIRO
HARLEY HUTCHINS

MAYER, BROWN & PLATT
231 South LaSalle Street
Chicago, Illinois 60604
(312) 782-0600

Counsel for Appellee Continental Illinois National Bank and Trust Company of Chicago

* Counsel of Record

Pandick Press Midwest, Inc., Chicago • 454-7600

QUESTIONS PRESENTED

1. Whether appellant, a self-appointed "citizens' group" which campaigned for the enactment of a state statute invalidated by the court of appeals, has standing to take an appeal to this Court to defend that statute when the responsible officials of the state involved have decided not to take an appeal.

2. Whether a state statute that retroactively impairs the security for and market value of municipal bonds by subjecting the essential terms of the bond covenants to a veto by public referendum conflicts with Art. I, §10, Cl. 1 of the Constitution, which forbids any state to "pass any * * * Law impairing the Obligation of Contracts."

LIST OF PARENT COMPANIES, SUBSIDIARIES AND AFFILIATES

The parent company of appellee Continental Illinois National Bank and Trust Company of Chicago ("Continental Bank") is Continental Illinois Corporation. Continental Bank's subsidiaries and affiliates, other than wholly owned subsidiaries and affiliates, are Continental Illinois Leasing S.A. (Spain), Commercial Continental Limited (Australia), Compania Financiera Ecuatoriana de DeSarrollo S.A. (Ecuador), Malaysian International Merchant Bankers Berhad (Malaysia), Rizal Commercial Banking Corporation (Philippines), and NAL Merchant Bank Limited (Nigeria).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1445

THE DON'T BANKRUPT WASHINGTON COMMITTEE, APPELLANT

v.

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, SEATTLE-FIRST NATIONAL BANK, MORGAN GUARANTY TRUST COMPANY OF NEW YORK, AND THE UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION OF APPELLEE CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Rules of this Court, appellee Continental Illinois National Bank and Trust Company of Chicago moves to dismiss the appeal herein on the ground that appellant lacks standing under traditional prudential requirements and under Article III of the Constitution to invoke the appellate jurisdiction of this Court. In the alternative, appellee moves for an order summarily affirming the judgment below since it correctly applies legal principles recently articulated by this Court to the facts of this particular case.

OPINION BELOW

The opinion of the court of appeals (J.S. App. 1a-20a) is reported at 696 F.2d 692. The opinion of the district court (J.S. App. 21a-23a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 11, 1983. A notice of appeal was filed by appellant on January 20, 1983. The jurisdictional statement was filed on February 25, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(2). As explained on pages 6-17, *infra*, this Court lacks jurisdiction to entertain the instant appeal because the sole appellant in this case, The Don't Bankrupt Washington Committee, lacks standing under traditional prudential standards and under Article III of the Constitution to invoke the appellate jurisdiction of the Court. See *Valley Forge Christian College* v. *Americans United For Separation Of Church and State*, 454 U.S. 464 (1982).

STATEMENT

1. In December 1981, appellees Continental Illinois National Bank and Trust Company of Chicago ("Continental Bank"), Seattle-First National Bank, and Morgan Guaranty Trust Company of New York filed a complaint in the district court alleging that a newly enacted statute of the State of Washington, referred to as Initiative 394, violated the Contract Clause of the Constitution.[1] The complaint named as defendants the State of Washington, the Governor, the Attorney General, and the Secretary of State. In April 1982, the United States filed a parallel suit against the same defendants, also alleging that Initiative 394 violated the Contract Clause (J.S. App. 2a).

[1] The statute (Initiative 394, Ch. 6, 1981 Wash. Laws, 2d Ex. Sess.) is reproduced at J.S. App. 26a-32a. Continental Bank and the other bank appellees brought suit in their capacity as trustees for public bondholders whose contractual rights were impaired by this legislation (J.S. App. 2a n. 1). In addition to their challenges under the Contract Clause, the bank appellees alleged that the state statute infringed the Equal Protection, Commerce, and Supremacy Clauses of the Constitution.

Initiative 394 provides that the Washington Public Power Supply System ("WPPSS"), a municipal corporation empowered to issue bonds, may not in the future issue additional bonds to finance the completion of certain public utility construction projects unless issuance of those bonds is first approved by a public referendum. See J.S. App. 6a-9a. Appellees alleged that this Initiative impaired covenants previously made by WPPSS to its bondholders and to the United States, which required the issuance of additional bonds to complete three of its utility construction projects ("Projects 1, 2 and 3").[2]

Appellant, The Don't Bankrupt Washington Committee, moved to intervene in both cases in the district court. It claimed that it had an interest in the litigation because it participated in the drafting of the Initiative, because it had campaigned for passage of the Initiative, and because it possessed expertise concerning the Initiative and its history.[3] The district court permitted appellant to intervene as an additional defendant (J.S. App. 2a).

2. Following extensive pre-trial proceedings, the parties submitted the case on a stipulated record and filed legal memoranda analyzing the constitutional questions presented. After reviewing the record, the district court entered judgment in favor of appellees, concluding that Initiative 394 violated the Contract Clause of the Constitution.

The district court found by a "preponderance of the evidence" that Initiative 394 injured bondholders by "immediately impairing their contractual rights," by "reducing the security for their bonds," by "creating uncertainty as to the ability of [WPPSS] to finance the completion of each project"

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[2] In the words of the court of appeals (J.S. App. 14a-15a): "The issuance of additional bonds by WPPSS is essential to the performance of its contracts * * *."

[3] For the convenience of the Court, we have lodged copies of appellant's motion to intervene together with the supporting papers.

that it had covenanted to complete, and by "reducing the value of [the] bonds on the secondary market" (J.S. App. 21a-22a). The district court also found (*id.* at 22a) that the statute imposed a "retroactive" and "substantial" impairment of the contractual rights of bondholders. Applying this Court's decision in *United States Trust Co.* v. *New Jersey*, 431 U.S. 1 (1977), the district court concluded that the impairment was neither "reasonable" nor "necessary," and that the statute therefore was unconstitutional as retroactively applied to Projects 1, 2 and 3 (J.S. App. 23a).

3. The court of appeals unanimously affirmed the decision of the district court, finding that it had correctly applied the principles of *United States Trust Co.* v. *New Jersey, supra*, and *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1978). The court of appeals observed that Initiative 394 "permits destruction" of the "primary purpose" of the contracts at issue in this case (J.S. App. 11a), and that the state did not "reserve" the right to nullify its commitments in this fashion (*id.* at 11a-14a). It also upheld the district court's conclusion that the state statute substantially impairs the rights of appellees because it abrogates commitments "essential to the performance of [WPPSS'] contracts" (*id.* at 14a-15a). Finally, the court of appeals ruled that retroactive impairment of these contractual rights was wholly without justification, since the state's professed goal of promoting economy could be achieved by means other than retroactive impairment of the contractual rights of the United States and public bondholders (*id.* at 16a-20a).[4]

4. Following the decision of the court of appeals, the State of Washington, by its Attorney General, entered into an agreement with WPPSS. See Add., *infra*, A-1 to A-5. Under that agreement, WPPSS promised to submit to an extensive cost-effectiveness evaluation prior to the issuance of additional bonds to fund construction of any of its projects. *Id.* at A-2 to

[4] The court of appeals, like the district court, did not reach the other constitutional claims raised by appellees.

A-4. In return, the Attorney General, acting in his official capacity "as counsel for the State of Washington and [the] state officers named as parties," promised "not to seek review by the United States Supreme Court." *Id.* at A-4. That decision rested on the Attorney General's assessment of "all matters relating to the availability of review by the United States Supreme Court and the contractual undertaking by the Washington Public Power Supply System" (*ibid.*), as well as the need for "a prompt, final resolution of that litigation." *Id.* at A-1. In particular, the Attorney General made his decision not to appeal after careful consideration of "the consequences to the citizens of the state [of] continuing this litigation." *Id.* at A-2. The agreement signed by the Attorney General of the State of Washington is set forth in full in the addendum attached hereto.[8]

Despite the fact that the government official responsible for conducting litigation on behalf of the State of Washington has decided not to seek review in this Court, appellant has filed a notice of appeal and a jurisdictional statement. In its jurisdictional statement, appellant argues that the decision of the court of appeals is in error and should be reversed. For the reasons set forth below, however, appellant does not have standing to invoke the appellate jurisdiction of this Court and its attempted appeal should be dismissed.

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[8] Having considered "the mutual interests of the State, its citizens, and the Washington Public Power Supply System" (*id.* at A-2), the Attorney General "promises and agrees *not to seek review* by the United States Supreme Court" (Add., *infra*, A-4; emphasis in original). The Attorney General reserves the right to file a document expressing views in this Court only if the Court previously has noted probable jurisdiction over an appeal filed by some "other party" (*id.* at A-5).

ARGUMENT

I. APPELLANT, A CITIZENS' GROUP WHICH HAS NOT SUFFERED CONCRETE HARM AS A RESULT OF THE DECISION OF THE COURT OF APPEALS, AND WHICH HAS NO AUTHORITY TO CONDUCT LITIGATION ON BEHALF OF THE STATE OF WASHINGTON, LACKS STANDING UNDER TRADITIONAL PRUDENTIAL REQUIREMENTS AND UNDER ARTICLE III OF THE CONSTITUTION TO INVOKE THE APPELLATE JURISDICTION OF THIS COURT

Although appellant is quick to advance constitutional arguments for overturning the decision of the court of appeals, it wholly overlooks the fundamental question whether it has standing to invoke this Court's appellate jurisdiction. As an examination of the documents filed by appellant in this litigation clearly discloses, appellant lacks standing to appeal under Article III of the Constitution — which embraces only actual "case[s] or controvers[ies]," not abstract debates over issues of good government.

The constitution and statutes of the State of Washington charge the Governor and Attorney General with the duty to "see that the laws are faithfully executed" through litigation in appellate courts.[6] This appeal is *not* brought by the Attorney General of the State of Washington or any other responsible government official. The representatives of the State of Washington have, in the words of appellant's counsel, "decided not to appeal"[7] and "have no interest in the outcome of this

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[6] Wash. Const. Art. III, §5; Wash. Rev. Code Ann. §43.10.030 (West 1982); *Young Americans for Freedom* v. *Gorton*, 588 P.2d 195 (Wash. S. Ct. 1978) (en banc).

[7] March 1, 1983, letter from counsel of record for appellant, reproduced at Add., *infra*, A-7.

appeal."[8] In view of that fact, the Clerk's Office has directed appellant to "change the cover of the Jurisdictional Statement" to clearly disclose that the State is not a party appellant.[9] Rather than seeking review by this Court, the State of Washington has entered into a compact with WPPSS, by which it has waived its right of appeal in favor of an agreement requiring WPPSS to conduct comprehensive cost-effectiveness studies. That compact, signed by the Attorney General, was designed to serve the "mutual interests of the State, its citizens, and the Washington Public Power Supply System." See Add., *infra*, A-2.

Thus, the only appellant in this case is a self-appointed "citizens' group" which, according to the jurisdictional statement, "drafted and campaigned for" Initiative 394 (J.S. 3). While such a "citizens' group" undoubtedly has sufficient concern over state legislation to participate in the political process, it does not have a direct personal stake in the outcome of the present litigation that would permit it to invoke this Court's appellate jurisdiction after the Attorney General has determined that the state will not take an appeal.

1. Before examining in greater detail appellant's insubstantial interest in the present litigation, we briefly summarize the governing legal principles. The standing doctrine represents a "blend of constitutional requirements and prudential considerations" that confine the jurisdiction of all federal courts. *Valley Forge Christian College* v. *Americans United For Separation Of Church And State*, 454 U.S. 464, 471-472 (1982). Thus, a party invoking the jurisdiction of this Court has the burden of clearly demonstrating, on the basis of the record compiled below, that he has suffered or is about to suffer "a distinct and palpable injury to himself" (*Gladstone*,

[8] February 25, 1983, letter from counsel of record for appellant filed pursuant to Rule 10.4 of the Rules of this Court, reproduced at Add., *infra*, A-9.

[9] See Add., *infra*, A-7.

Realtors v. *Village of Bellwood*, 441 U.S. 91, 100 (1979)). This requires a demonstration of "particular concrete injury" (*United States* v. *Richardson*, 418 U.S. 166, 177 (1974))—injury which is not "abstract" (*Schlesinger* v. *Reservists To Stop The War*, 418 U.S. 208, 217 (1974)), "hypothetical" (*id.* at 224), "uncertain" (*Valley Forge Christian College, supra*, 454 U.S. at 477), or "indirect" in character (*Roe* v. *Wade*, 410 U.S. 113, 128 (1973)).

Beyond this, a party seeking to invoke the judicial process may not present its case "in the rarified atmosphere of a debating society" or attempt to use the federal courts as "publicly funded forums for the ventilation of public grievances" (*Valley Forge Christian College, supra*, 454 U.S. at 472, 473). Because litigants are precluded from suing "to air * * * generalized grievances about the conduct of government" (*id.* at 483), they may not assert claims "shared in substantially equal measure by all or a large class of citizens" (*Warth* v. *Seldin*, 422 U.S. 490, 499 (1975)). A party must, in short, allege "an injury peculiar to himself, as distinguished from the great body of his fellow citizens" (*Schlesinger, supra*, 418 U.S. at 220 n. 8). It is insufficient that he "suffers in some indefinite way in common with people generally" (*ibid.*). This Court repeatedly has held that citizen-plaintiffs may not champion a "general interest common to all members of the public" (*Ex Parte Levitt*, 302 U.S. 633, 634 (1938)), or debate in federal court "abstract questions of wide public significance" (*Warth, supra*, 422 U.S. at 500).

To the extent that a litigant alleges financial harm, it is essential to show a "direct pecuniary injury" (*Doremus* v. *Board of Education*, 342 U.S. 429, 434-435 (1952)), or a "direct dollars-and-cents" interest that is "measurable" and which forms the basis for a "good-faith pocketbook action" (*ibid.*). It does not suffice to claim "indeterminable" economic loss or financial harm that is "fluctuating and uncertain" (*Frothingham* v. *Mellon*, 262 U.S. 447, 487 (1923); *Richardson, supra*, 418 U.S. at 174-180).

In addition, a party claiming standing must establish that its individualized injury "is likely to be redressed by a favorable decision" (*Valley Forge Christian College, supra,* 454 U.S. at 472), and that it "personally would benefit in a tangible way from the court's intervention" (*id.* at 481 n. 17). Standing will be denied if it is "speculative whether the desired exercise of the court's remedial powers" would benefit the party (*Simon* v. *Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 43, 44-46 (1976)).

This Court also has confirmed that the standing doctrine precludes suit if the would-be litigant is not "the 'proper party' to present the claim" (*Schlesinger, supra,* 418 U.S. at 218). Thus, the standing doctrine "focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated" (*Valley Forge Christian College, supra,* 454 U.S. at 484). It closes the federal courts to "questions of broad social import where no individual rights would be vindicated" and limits access to "those litigants best suited to assert a particular claim" (*Gladstone, Realtors, supra,* 441 U.S. at 100). For this reason, private citizens — who are not duly authorized government officials — may not attempt "to assert the States' interest in their legislative prerogatives" (*Flast* v. *Cohen,* 392 U.S. 83, 105 (1968)). And if a State declines to prosecute an appeal to this Court, an attempted appeal filed by a citizen who lacks standing to sue must be dismissed since the Court does "not sit to decide hypothetical issues or to give advisory opinions about issues as to which there are not adverse parties before us." *Princeton University* v. *Schmid,* 455 U.S. 100, 102 (1982).

Finally, the decisions of this Court establish that a citizen organization's "concern" over or "interest" in a legal issue is not a substitute for standing to sue in the constitutional sense. See *Doremus* v. *Board of Education, supra,* 342 U.S. at 435: "It is not a question of motivation but of possession of the requisite financial interest * * *." Thus, "sincerity" and "depth of * * *

commitment" do not confer standing to sue, "no matter how qualified the organization is in evaluating the problem" (*Schlesinger, supra,* 418 U.S. at 225-226). See also *Valley Forge Christian College, supra,* 454 U.S. at 486: "standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy."

Applying these principles to the present case, it is clear that appellant does not have standing to defend a statute which the State of Washington has decided not to defend. Appellant has no interest apart from the general interest of all other citizens and utility ratepayers who may favor enforcement of the statute reviewed by the court of appeals. Accordingly, unless this Court is prepared to open the doors of the federal judiciary to citizens' complaints alleging the most general grievances concerning issues of broad public concern, the present appeal must be dismissed.[10]

2. Appellant's jurisdictional statement asserts only in the most conclusory fashion that appellant is a "citizens' group" which drafted and supported the Initiative at issue (J.S. 3). The motion for intervention filed in the district court adds little more of relevance. In its memorandum in support of that

[10] Decisions of responsible government officials to forgo appellate review in this Court occur with some regularity. On appropriate occasions, the Attorney General of the United States declines to appeal lower court rulings invalidating federal statutes after notifying Congress of that decision. See 28 U.S.C. (Supp. II) 519 note. If the appeal in this case were entertained, the Court would be confronted in the future with attempted appeals by "citizens' groups" alleging "interest" and "concern" comparable to the allegations of appellant here, even though the Attorney General of the United States, or the attorney general of the affected state, deliberately declined to pursue appellate review. Citizen appeals in government litigation could materially interefere with policy determinations of responsible government officials, who have concluded that the public interest would best be served by "a prompt, final resolution of that litigation" (Add., *infra,* A-1).

motion, appellant states that its members participated in the drafting of the Initiative, canvassed voters to muster public support, and spent funds collected from the public to obtain passage of the measure (memorandum at 2-10). And in an attached affidavit of its president, appellant also states that its membership at one time included "utility ratepayers who could be directly affected by the WPPSS projects * * *" (affidavit at 3).[11]

Generalized allegations of this kind do not, however, take appellant and its members out of the category of concerned bystanders or demonstrate the kind of direct, particularized injury needed to invoke the judicial process.

a. Appellant's asserted interest in the present litigation, based on its members' activities as concerned "citizens" who supported the Initiative at issue, does not confer standing to sue. If it did, any citizen who supported a piece of legislation, lent aid in obtaining its passage, or contributed funds to generate publicity, would be empowered to stand in the shoes of the Attorney General and to litigate the constitutionality of the enactment. But citizens share only a generalized and undifferentiated interest in state statutes which they favor. Their concerns — however valid and public-spirited — are not justiciable in federal court because they are "shared in substantially equal measure by all or a large class of citizens" (*Warth* v. *Seldin, supra,* 422 U.S. at 499). Mere "interest" in, or "concern" over, a particular piece of legislation does not confer standing to sue: it does not separate appellant from the hundreds of thousands of other concerned citizens who supported the statute in question.

It is irrelevant that appellant here was permitted to intervene as an additional defendant in the district court. At that stage of the proceeding, an actual case or controversy

[11] As previously noted, these documents have been lodged with the Court. The affidavit does not disclose the identity of the current members of the organization, or even indicate their present number.

existed. State officials charged with enforcement of the Washington statute vigorously defended its validity. The district court was not required to, and did not, ascertain whether appellant had "standing" in the constitutional sense absent the active participation of those state officials.[12] See *Princeton University* v. *Schmid*, 455 U.S. 100, 101-103 & n. * (1982), where a private organization was permitted to "intervene" as a "party" in government litigation. When the government subsequently declined to appeal the case, the private organization was found to lack "standing" to prosecute the litigation in this Court and its attempted appeal was dismissed.

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[12] Thus, it was unnecessary to determine whether appellant, participating as an intervenor, had standing under Article III. See 7A C. Wright & A. Miller, *Federal Practice & Procedure* §1911 at 539-540 (1972 ed.) (Rule 24 "plainly dispenses with any requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation"). Moreover, despite appellant's intervention in the lower courts, it is incumbent upon "the Court itself" to determine whether appellant has "standing" absent the participation of responsible government officials. See *Princeton University* v. *Schmid*, 455 U.S. 100, 102 n. * (1982).

Looking beyond form to substance, it is quite clear that no case or controversy ever existed between appellees and appellant. The role of appellant at all stages of this litigation has been essentially that of an amicus curiae. It could not seriously be contended that a suit filed by appellees solely against appellant — a "citizens' group" without law enforcement powers — would present an actual case or controversy between adverse parties. And certainly the "citizens' group" could not have filed suit against appellees. The only adverse parties in the lower courts were appellees and the state officials who threatened to enforce Initiative 394 to the detriment of the financial interests of appellees and public bondholders. Since those state officials have declined to invoke this Court's appellate jurisdiction to overturn the injunction entered against them (J.S. App. 23a), appellant's constitutional claims are presented in the abstract — not in the context of a live case or controversy between adverse parties.

Nor does it matter that appellant has expended time and money collected from certain contributors to promote the passage of the Initiative or that it has acquired "expertise" on the subject matter. The same could be said of the separationist group in *Valley Forge Christian College*, which claimed to be an organization with 90,000 members possessing "unique attributes," including "knowledge and resources," that vested it with special competence "to litigate Establishment clause issues." It expended substantial time and money in challenging an allegedly improper property transfer at issue in that case, as well as in advocating its positions nationwide. See No. 80-327 Appellee's Br. at 8-9, 31-32. This Court nonetheless ruled that "standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy" — or by the "clash" of political views, however "real" and "strong" (454 U.S. at 478, 486). Accord, *Schlesinger, supra*, 418 U.S. at 210 n. 1, 225-226, holding that "a national unincorporated association of present and former officers and enlisted members of the Reserves, organized for the purpose of opposing the military involvement of the United States in Vietnam and of using all lawful means to end that involvement * * *," lacked standing to challenge the constitutionality of the military status of members of Congress, notwithstanding the organization's deep political involvement in the underlying issue. Despite "the sincerity of respondents' stated objectives and the depth of their commitment," the constitutional requirement of a direct personal stake was not satisfied. See also *Sierra Club* v. *Morton*, 405 U.S. 727, 739 (1972), holding that "mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient * * *." In that case, the organization expended time and money to participate in public hearings on the proposed land development project, and also waged an intensive campaign to lobby "officials of the Forest Service and the Department of the Interior." *Id.* at 730; see also *Simon, supra*, 426 U.S. at 39-40.

Appellant's interest in the present litigation differs not at all from the political interest of the unsuccessful litigants in the foregoing cases. This Court's decisions denying standing in those cases compel dismissal of the instant appeal.[13]

b. Nor does appellant have standing to invoke this court's jurisdiction simply because some of its members are "ratepayers" who "could" be affected by the outcome of the present litigation. Appellant has not even attempted to assert a good faith pocketbook claim, based on an ascertainable dollars and cents injury. To the contrary, its claim of possible economic harm is conjectural and remote and does not confer standing under Article III.

As appellant repeatedly asserts in its jurisdictional statement, Initiative 394 does not "mandate a substantive result" for ratepayers (J.S. 3, 9). Thus, the statute does not require any reduction in electricity rates, for it "does not, by its terms, limit spending" (J.S. 28). Whether or not this general scheme of

[13] The decision of the court of appeals invalidating Initiative 394 does not, of course, bar appellant or its members from advocating the adoption of alternative legislation to deal with cost containment problems of power generating facilities (see J.S. App. 16a-20a). The Attorney General of Washington already has secured agreement to implement alternative remedies. See Add., *infra*, A-1 to A-5. Thus, at issue in this case is a single remedy for a perceived problem: a remedy now abandoned by the elected officials of the state after a careful review of public policy considerations. Whatever appellant's interest in continuing to support a statute that the State of Washington declines to defend, that interest is not distinguishable from the undifferentiated interest of any other concerned citizen who favors the statute. See *Schlesinger, supra*, 418 U.S. at 216-217. As this Court has emphasized, "assertion of a right to a particular kind of Government conduct * * * cannot alone satisfy the requirements of Art. III without draining those requirements of meaning." *Valley Forge Christian College, supra*, 454 U.S. at 483.

"citizen review" (J.S. 7, 26) ultimately would decrease the rates paid by consumers is a matter of sheer conjecture.[14]

Indeed, if inference is to be indulged, it is probable that the statute would increase — rather than decrease — utility rates, at least for the immediate and intermediate term. As the jurisdictional statement concedes (J.S. 4), WPPSS to date has issued revenue bonds with a face value of several billion dollars. And the utility system is "obligated by contract to pay off this debt from rates charged to [its] ratepayers even if the projects are never completed" (*id.* at 4). If the scheme of "citizen review" advocated by appellant were permitted to jeopardize the sale of additional bonds, that would only hinder the completion of Projects 1, 2 and 3 and leave ratepayers with the burden of preexisting debt without any new source of income.

Based on all of the evidence — including all of the evidence tendered by appellant — the district court found (J.S. App. 21a to 22a) that Initiative 394 casts into doubt "the ability of the Supply System to finance the completion of each project." It also found that the statute has reduced the value of WPPSS "bonds on the secondary market" (*ibid.*; see also J.S. App. 15a-16a), thus raising the future cost of capital to WPPSS.

[14] As appellant points out, the immediate economic effect of the statute is "contingent" (J.S. 19 n. 19) on the unknowable result of a political debate and referendum vote (J.S. 6-7, 28; J.S. App. 6a-9a). The intermediate effect of any referendum vote on the financial condition of a utility system would depend on all of the economic circumstances governing its operations, including the level of its revenues, existing debt service obligations and general business expenses, present capital needs, available investment options, and prevailing regulatory constraints. Accordingly, to predict economic consequences for individual ratepayers as a result of the adoption of a statutory scheme of "citizen review" would be a matter of blind guesswork, whether considered from the point of view of "the real economic world" or the "economist's hypothetical model." *Illinois Brick* v. *Illinois*, 431 U.S. 720, 742 (1977).

The findings of the district court only confirm that appellant's financial stake "is at best speculative and at worst nonexistent" (*Valley Forge Christian College, supra,* 454 U.S. at 480 n. 17; *Simon, supra,* 426 U.S. at 44-46). Thus, appellant has failed to establish, without impermissible reliance on conjecture and speculation, that ratepayers "personally would benefit in a tangible way from the court's intervention" (454 U.S. at 481 n. 17). Stated otherwise, appellant's purported economic interest is wholly "uncertain" and "indeterminable" (*Frothingham, supra,* 262 U.S. at 487).[18]

c. Nor can appellant find comfort in *Flast* v. *Cohen,* 392 U.S. 83 (1968), which confers "taxpayer" standing on plaintiffs who allege substantial expenditures by the legislature in violation of a specific constitutional prohibition. This Court repeatedly has declined to extend *Flast.* See *Valley Forge Christian College, supra,* 454 U.S. 478, 482; *Schlesinger, supra,* 418 U.S. at 227-228; *Richardson, supra,* 418 U.S. at 174-175. And to apply the rationale of *Flast* here would twist this Court's holding in that case beyond all recognition.

Appellant here is not challenging the threatened disbursement of tax revenues in violation of the federal constitution. Quite to the contrary, it is seeking to give effect to a state statute which has been invalidated on federal constitutional grounds. And, in stark contrast to a taxpayer who seeks to halt an ascertainable loss of government funds by

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[18] While the statute's effect on the financial situation of ratepayers is entirely speculative for the reasons summarized above, the impact of the statute on the rights of bondholders and the United States is direct, substantial, and adverse. As explained by the district court and the court of appeals (J.S. App. 15a-16a, 21a-23a), the statute jeopardizes the "ability of WPPSS to carry out its covenants in the manner originally promised," and abrogates "central" security provisions which were a major "inducement to contract." As a consequence, the statute has the effect of "reducing the value of [the] bonds on the secondary market" (J.S. App. 22a).

enjoining an illegal disbursement, appellant here seeks only to vindicate the general public interest in enforcement of a "citizen review" procedure of conjectural economic benefit to its members. Because appellant has proven no interest that differs from the abstract interest of all other citizens and ratepayers who favor the Initiative, and because it requires "unadorned speculation" to perceive any personal financial benefit to appellant or its members that could result from this Court's intervention (*Simon, supra,* 426 U.S. at 44-45), it is wholly inappropriate to permit appellant "to employ a federal court as a forum in which to air [its] generalized grievances about the conduct of government" (*Richardson, supra,* 418 U.S. at 175).

d. In sum, traditional prudential considerations bar a "citizens' group" such as appellant from standing in the shoes of the Attorney General of the State of Washington. The Attorney General alone is empowered to defend the constitutionality of state statutes and to seek review in this Court of injunctive orders entered against state officials (see J.S. App. 23a). Where, as here, the Attorney General declines for reasons of public policy to take an appeal to this Court, he acts on behalf of *all* of the people of the state — including concerned "citizens' groups." Beyond this, appellant's attempted appeal is foreclosed by Article III of the Constitution. In the absence of particularized injury that is concrete in nature, appellant may proceed no further and its appeal to this Court should be dismissed.[16]

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[16] Appellant's failure to demonstrate that it has standing under governing prudential and constitutional criteria appears not merely as a deficiency in pleading, but also as a deficiency in proof following a hearing on the merits. As appellant acknowledges, it has had the opportunity to submit "thousands of pages" of record materials and "more than 80 pages of proposed findings" (J.S. 8). Despite that opportunity to fully establish its status and interest as a matter of record in the district court, appellant has not come close to satisfying the traditional prerequisites of the standing doctrine.

II. BECAUSE THE COURT OF APPEALS CORRECTLY APPLIED LEGAL PRINCIPLES RECENTLY ARTICULATED BY THIS COURT, PLENARY REVIEW OF ITS DECISION WOULD SERVE NO USEFUL PURPOSE

In the alternative, appellee Continental Bank submits that the judgment of the court of appeals should be affirmed. Since the motions to dismiss or affirm filed by the United States, Seattle-First National Bank, and Morgan Guaranty Trust Company of New York adequately demonstrate that the decision below correctly applies well-established legal principles to the facts of record, there is no point in repeating that analysis here. For the reasons stated in those motions, the decision of the court of appeals should be affirmed summarily if the present appeal is not dismissed.

At a time when this Court's docket is burdened with a steadily increasing number of cases raising novel questions of substantial public importance, it would serve no useful purpose to grant plenary review in a case such as this, in which the lower courts faithfully applied legal principles recently articulated by this Court in *United States Trust Co.* v. *New Jersey,* 431 U.S. 1, 14-32 (1977), and *Allied Structural Steel Co.* v. *Spannaus,* 438 U.S. 234, 240-251 (1978). This Court reaffirmed those principles earlier this Term in *Energy Reserves Group, Inc.* v. *Kansas Power and Light Co.,* 51 U.S.L.W. 4106, 4109 n. 14 (1983): "When a State itself enters into a contract, it cannot simply walk away from its financial obligations. In almost every case, the Court has held a governmental unit to its contractual obligations when it enters financial or other markets. * * * When the State is a party to the contract, 'complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake.'" These precedents apply directly here, and require affirmance of the decision of the court of appeals.

CONCLUSION

The appeal should be dismissed for lack of jurisdiction. In the alternative, the judgment of the court of appeals should be summarily affirmed.[17]

Respectfully submitted.

FRANKLIN P. AUWARTER*
STEPHEN M. SHAPIRO
HARLEY HUTCHINS

MAYER, BROWN & PLATT
231 South LaSalle Street
Chicago, Illinois 60604
(312) 782-0600

Counsel for Appellee Continental Illinois National Bank and Trust Company of Chicago

* Counsel of Record

MARCH 1983

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[17] Considerations of public policy militate strongly in favor of summary disposition. As fully explained in the motion to dismiss or affirm filed by the United States, each additional day of delay in finally concluding this litigation imposes a substantial financial burden on WPPSS by obstructing its ability to market new bonds and by interfering with its ability to complete construction of Projects 1, 2 and 3. In the words of the Attorney General of the State of Washington, "The Washington Public Power Supply System is not a party to the [present] litigation but is directly affected by the results thereof and needs a prompt, final resolution of that litigation" (Add., *infra*, A-1).

THE SEAL OF THE STATE OF WASHINGTON

OFFICE OF THE
ATTORNEY GENERAL

AGREEMENT BETWEEN STATE OF WASHINGTON AND THE WASHINGTON PUBLIC POWER SUPPLY SYSTEM

Preamble

On January 10, 1983, the United States Court of Appeals for the Ninth Circuit (# 82-3404) affirmed the conclusion of the United States District Court for the Western District of Washington in *Continental Illinois National Bank and Trust Co. of Chicago, et al.* v. *State of Washington, et al. and Don't Bankrupt Washington Committee, Intervenor,* (C82-94T) and *United States* v. *State of Washington and Don't Bankrupt Washington Committee, Intervenor,* (C82-395T) concluding that the contract clause of the United States Constitution renders the voter approval provisions of Initiative 394 (chapter 6, Laws of 1981, 2nd Ex. Sess.) not applicable to the financing of construction of Washington Public Power Supply System's Projects 1, 2, and 3. The District Court concluded that the cost effectiveness study requirements of initiative 394 are not severable and, therefore, do not apply to those projects. The Ninth Circuit Court of Appeals did not address that conclusion on the assumption that such cost effectiveness studies were being undertaken.

The Washington Public Power Supply System is not a party to the above-referred to litigation but is directly affected by the results thereof and needs a prompt, final resolution of that litigation.

KEN EIKENBERRY
Attorney General
Temple of Justice,
Olympia, Washington 98504

OFFICE OF THE ATTORNEY GENERAL

The State of Washington in defending the policy determination made by the voters of this state in enacting Initiative 394, must consider whether to seek judicial review by the United States Supreme Court. In making that consideration, the state must assess the opportunity to achieve a modification or reversal of the determination made by the Ninth Circuit Court of Appeals, the changes and circumstances which have occurred by virtue of the passage of Initiative 394, and the consequences to the citizens of the State by continuing this litigation.

The parties to this agreement have concluded that it is in the mutual interests of the State, its citizens, and the Washington Public Power Supply System to reach the following agreement.

Obligations by the Washington Public Power Supply System

The Washington Public Power Supply system agrees, convenants, and obligates itself prior to the issuance of any bonds of indebtedness on Projects 1, 2 or 3 to:

(1) Determine the anticipated costs of construction of the project;

(2) Select, subject to the approval of the State Finance Committee, an independent consultant to conduct a cost-effectiveness study pertaining to the energy project under consideration which is the subject matter of the proposed bonded indebtedness, and to provide the independent consultant with adequate resources to conduct the study;

(3) The independent consultant shall prepare a comprehensive cost-effectiveness study with reference to the project and shall include as part of that report a summary identifying:

(a) the name, location, and type of major public energy project, expressed in common terms;

(b) the dollar amount and type of bonds being requested;

(c) if the bond issuance is intended to finance the acquisition of all or a portion of the project, the anticipated total cost of the acquisition of the project;

(d) if the bond issuance is intended to finance the planning or construction of all or a portion of the project, the anticipated total cost of construction of the project;

(e) the projected average rate increase for consumers of the electricity to be generated by the project. The rate increase shall be that which will be necessary to repay the total indebtedness incurred for the project, including estimated interest;

(f) a summary of the cost-effectiveness study;

(g) the anticipated functional life of the project;

(h) the anticipated decommissioning costs of the project.

(4) One hundred copies of said study must be submitted to the Secretary of State, and five copies to the Washington State Energy Office.

(5) The study shall be available for public review and comment, including review and comment by the Washington State Energy Office, for thirty days.

(6) After the period of availability for public review and comment the consultant shall prepare a final draft of the study which includes public comment, if any. The final draft shall note and respond to any comments transmitted to the consultant by the Washington State Energy Office. The said final report shall be promptly filed with the Secretary of State.

The parties recognize that the cost-effectiveness studies for Projects 2 and 3 are substantially completed and the period for public comment on the same has expired. Therefore, upon the completion of the final draft and the acceptance of the same, the only remaining obligation is to promptly file the final draft of the studies with the Secretary of State.

Washington Public Power Supply System further agrees and covenants that if Projects 4 and 5, which have been terminated, are revived under the ownership of or financing by the Power Supply System that it will, irrespective of whether Initiative 394 applies to such projects, comply with the cost-effectiveness study requirements set forth in this contract for Projects 1, 2, and 3.

If costs of construction exceed the anticipated cost of construction upon which the cost-effectiveness study was predicated, then another cost-effectiveness study must be made prior to issuing bond indebtedness for financing such additional costs. Such an additional cost-effectiveness study requirement is required as a condition precedent to the issuance of bonded indebtedness in excess of the amount identified as the cost of construction upon which the prior cost effectiveness study was predicated.

Terms used in this contract shall have the meaning ascribed to them by definitions set forth in § 3, chapter 6, Laws of 1981, 2nd Ex. Sess.

Agreement by the State of Washington

The Attorney General as counsel for the State of Washington and state officers named as parties in *Continental Illinois National Bank and Trust Co. of Chicago, et al.* v. *State of Washington, et al. and Don't Bankrupt Washington Committee, Intervenor,* and *United States* v. *State of Washington and Don't Bankrupt Washington Committee, Intervenor,* Ninth Circuit Court of Appeals #82-3404, having considered all matters relating to the availability of review by the United States Supreme Court and the contractual undertaking by the Washington Public Power Supply System under this agreement, hereby promises and agrees *not to seek review* by the United States Supreme Court. This agreement does not preclude the State from participating in further proceedings in this litigation

if the court should order further proceedings nor does it preclude the state from expressing its views to the United States Supreme Court if the Court accepts for review that which is sought by any other party to the litigation.

AGREED TO THIS 11th day of February, 1983.

/s/ ROBERT L. FERGUSON	/s/ KEN EIKENBERRY
Washington Public Power Supply System	Attorney General State of Washington

SIDLEY & AUSTIN
A Partnership Including Professional Corporations
1722 Eye Street, N.W.
Washington, D.C. 20006
Telephone 202: 429-4000
Telex 89-463

One First National Plaza
Chicago, Illinois 60603
Telephone 312: 853-7000
Telex 25-4364

2049 Century Park East
Los Angeles, California 90067
Telephone 213: 553-8100
Telex 18-1391

9 Holland Park
London, W11 3th, England
Telephone 01: 727-0132
Telex 21781

P.O. Box 190
Muscat, Sultanate of Oman
Telephone 722-411
Telex 3266

P.O. Box 4619
Deira, Dubai-U.A.E.
Telephone 9714-283194
Telex 47216

Founded in 1866 as
Williams & Thompson

March 1, 1983

The Honorable Rex E. Lee
Solicitor General of the United States
United States Department of Justice
Room 5143
10th and Constitution Avenue, N.W.
Washington, D.C. 20530

Franklin P. Auwarter, Esq.
Mayer, Brown & Platt
231 South LaSalle Street
Chicago, Illinois 60604

William R. Squires, Esq.
Davis, Wright, Todd, Riese & Jones
4200 Seattle-First National Bank Bldg.
Seattle, Washington 98154

Re: The Don't Bankrupt Washington Committee v. Continental Illinois National Bank and Trust Company, Seattle-First National Bank and Morgan Guaranty Trust Company of New York, and the United States of America, No. 82-1445

Dear Messrs. Lee, Auwarter and Squires:

As required by the rules of the Supreme Court, I am enclosing a notice of The Don't Bankrupt Washington Committee's appeal in the Supreme Court in the above-captioned case. I am also enclosing an appearance form.

Since the State appellants have decided not to appeal, the Supreme Court Clerk's office asked the Committee to change the cover of the Jurisdictional Statement. I am also, therefore, enclosing a photo-copy of the revised cover. Except for the change on the cover, and a small conforming change on page one of the Jurisdictional Statement, the copies of the Jurisdictional Statement served on you are identical to those now in the possession of the Court. (The Jurisdictional Statement was docketed with the Court on February 25, 1983 as required by the stipulation between the parties, and the copies with the revised cover were presented to the Clerk on February 28, 1983.)

Sincerely,

/s/ BEN W. HEINEMAN, JR.
Ben W. Heineman, Jr.

BWH/kr
Enclosures

cc: Richard K. Willard, Esq.

SIDLEY & AUSTIN
A Partnership Including Professional Corporations
1722 Eye Street, N.W.
Washington, D.C. 20006
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One First National Plaza
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Telephone 722-411
Telex 3266

P.O. Box 4619
Deira, Dubai-U.A.E.
Telephone 9714-283194
Telex 47216

Founded in 1866 as
Williams & Thompson

February 25, 1983

Mr. Alexander L. Stevas
Clerk
United States Supreme Court
Washington, D.C. 20543

Re: State of Washington, et al. v. Continental Illinois National Bank & Trust Company, et al.; and State of Washington, et al. v. United States of America

Dear Mr. Stevas:

Pursuant to Rule 12.3, Rules of the Supreme Court, I am hereby docketing the above-captioned case in this Court on behalf of The Don't Bankrupt Washington Committee, intervenor-appellant, by filing with you an appearance form, a check for $200 as required by Rule 45(a), 40 copies of a jurisdictional statement, and a certificate of service as required by Rule 28.

Pursuant to Rule 10.4 of this Court, this letter shall also serve to inform you that it is the belief of intervenor-appellant that the State appellants below (the State of Washington, the Governor of Washington, John Spellman, the Secretary of State of Washington, Ralph Munro, and the Attorney General of Washington, Kenneth Eikenberry) have no interest in the outcome of this appeal and do not intend to file a jurisdictional statement. A copy of this letter — which constitutes the notice required by Rule 10.4 — is also being served on the parties below as indicated in the attached certificate of service.

Thank you for your cooperation in this matter.

Sincerely,

/s/ BENJAMIN W. HEINEMAN, JR.
Benjamin W. Heineman, Jr.

BWH/kr
Enclosures

cc: The Solicitor General
Richard K. Willard
William R. Squires
Franklin P. Auwarter
Kenneth O. Eikenberry

MAYER, BROWN & PLATT

COUNSELORS AT LAW

231 SOUTH LA SALLE STREET

CHICAGO, ILLINOIS 60604

312-782-0600
TELEX 253760
CABLE LEMAY

WASHINGTON, D C
LONDON
NEW YORK
DENVER
HOUSTON

March 21, 1983

Honorable Alexander L. Stevas
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: The Don't Bankrupt Washington Committee, Appellant v. Continental Illinois National Bank and Trust Company of Chicago, Seattle-First National Bank, Morgan Guaranty Trust Company of New York, and the United States of America, No. 82-1445

Dear Mr. Stevas:

The jurisdictional statement in the above-captioned case was filed on February 25, 1983. The motions to dismiss or affirm are due for filing in this Court within 30 days of that date. I am counsel of record for appellee Continental Illinois National Bank and Trust Company of Chicago, which will file a motion to dismiss or affirm on or before the due date.

In the motion to dismiss or affirm, we plan to make reference to certain materials that will not be readily available to the Justices. Accordingly, I am today lodging ten copies of those materials, along with copies of this cover letter, for the convenience of the Court.

The materials that we are lodging are as follows:

1. February 11, 1983 agreement signed by the Attorney General of the State of Washington pertaining to the appeal to this Court in the instant case.

2. February 25, 1983 letter of counsel of record for appellant distributed to all other counsel pursuant to Rule 10.4.

3. March 1, 1983 letter of counsel of record for appellant distributed to all other counsel of record, describing the parties to the present appeal.

4. February 18, 1982 motion of appellant to intervene in the district court in this case.

5. February 18, 1982 memorandum of appellant in support of its motion to intervene in the district court in this case.

6. February 17, 1982 affidavit of appellant filed in support of its motion to intervene in the district court in this case.

These materials should assist the Court in promptly determining the questions presented by the jurisdictional statement. I have served copies of this letter and the materials lodged herewith on all counsel required to be served.

Sincerely,

Franklin P. Auwarter

Counsel of Record for
Appellee Continental
Illinois National Bank
and Trust Company of
Chicago

cc: Benjamin W. Heineman, Jr.
Sidley & Austin
1722 Eye Street, N.W.
Washington, D.C. 20006

Honorable Rex E. Lee
Solicitor General
Department of Justice
Washington, D.C. 20530

William R. Squires
Davis, Wright, Todd, Riese
& Jones
4200 Seattle-First National Bank Bldg.
Seattle, Washington, 98154

Kenneth O. Eikenberry
Attorney General
State of Washington
415 General Administration Bldg. AX-02
Olympia, Washington 98504

OFFICE OF THE ATTORNEY GENERAL

AGREEMENT BETWEEN STATE OF WASHINGTON AND THE WASHINGTON PUBLIC POWER SUPPLY SYSTEM

Preamble

On January 10, 1983, the United States Court of Appeals for the Ninth Circuit (# 82-3404) affirmed the conclusion of the United States District Court for the Western District of Washington in Continental Illinois National Bank and Trust Co. of Chicago, et al. v. State of Washington, et al. and Don't Bankrupt Washington Committee, Intervenor, (C82-94T) and United States v. State of Washington and Don't Bankrupt Washington Committee, Intervenor, (C82-395T) concluding that the contract clause of the United States Constitution renders the voter approval provisions of Initiative 394 (chapter 6, Laws of 1981, 2nd Ex. Sess.) not applicable to the financing of construction of Washington Public Power Supply System's Projects 1, 2, and 3. The District Court concluded that the cost effectiveness study requirements of Initiative 394 are not severable and, therefore, do not apply to those projects. The Ninth Circuit Court of Appeals did not address that conclusion on the assumption that such cost effectiveness studies were being undertaken.

The Washington Public Power Supply System is not a party to the above-referred to litigation but is directly affected by the results thereof and needs a prompt, final resolution of that litigation.

The State of Washington in defending the policy determination made by the voters of this state in enacting Initiative 394, must consider whether to seek judicial review by the United States Supreme Court. In making that consideration, the state must assess the opportunity to achieve a modification or reversal of the determination made by the Ninth Circuit Court of Appeals, the changes and circumstances which have occurred by virtue of the passage of Initiative 394, and the consequences to the citizens of the state by continuing this litigation.

The parties to this agreement have concluded that it is in the mutual interests of the State, its citizens, and the Washington Public Power Supply System to reach the following agreement.

Obligations by the Washington Public Power Supply System

The Washington Public Power Supply system agrees, covenants, and obligates itself prior to the issuance of any bonds of indebtedness on Projects 1, 2 or 3 to:

(1) Determine the anticipated costs of construction of the project;

(2) Select, subject to the approval of the State Finance Committee, an independent consultant to conduct a cost-effectiveness study pertaining to the energy project under consideration which is the subject matter of the proposed bonded indebtedness, and to provide the independent consultant with adequate resources to conduct the study;

(3) The independent consultant shall prepare a comprehensive cost-effectiveness study with reference to the project and shall include as part of that report a summary identifying:

(a) the name, location, and type of major public energy project, expressed in common terms;

(b) the dollar amount and type of bonds being requested;

(c) if the bond issuance is intended to finance the acquisition of all or a portion of the project, the anticipated total cost of the acquisition of the project;

(d) if the bond issuance is intended to finance the planning or construction of all or a portion of the project, the anticipated total cost of construction of the project;

(e) the projected average rate increase for consumers of the electricity to be generated by the project. The rate increase shall be that which will be necessary to repay the total indebtedness incurred for the project, including estimated interest;

(f) a summary of the cost-effectiveness study;

(g) the anticipated functional life of the project;

(h) the anticipated decommissioning costs of the project.

(4) One hundred copies of said study must be submitted to the Secretary of State, and five copies to the Washington State Energy Office.

(5) The study shall be available for public review and comment, including review and comment by the Washington State Energy Office, for thirty days.

(6) After the period of availability for public review and comment the consultant shall prepare a final draft of the study which includes public comment, if any. The final draft shall note and respond to any comments transmitted to the consultant by the Washington State Energy Office. The said final report shall be promptly filed with the Secretary of State.

The parties recognize that the cost-effectiveness studies for Projects 2 and 3 are substantially completed and the period for public comment on the same has expired. Therefore, upon the completion of the final draft and the acceptance of the same, the only remaining obligation is to promptly file the final draft of the studies with the Secretary of State.

Washington Public Power Supply System further agrees and covenants that if Projects 4 and 5, which have been terminated, are revived under the ownership of or financing by the Power Supply System that it will, irrespective of whether Initiative 394 applies to such projects, comply with the cost-effectiveness study requirements set forth in this contract for Projects 1, 2, and 3.

If costs of construction exceed the anticipated cost of construction upon which the cost-effectiveness study was predicated, then another cost-effectiveness study must be made prior to issuing bond indebtedness for financing such additional costs. Such an additional cost-effectiveness study requirement is required as a condition precedent to the issuance of bonded indebtedness in excess of the amount identified as the cost of construction upon which the prior cost effectiveness study was predicated.

Terms used in this contract shall have the meaning ascribed to them by definitions set forth in § 3, chapter 6, Laws of 1981, 2nd Ex. Sess.

Agreement by the State of Washington

The Attorney General as counsel for the State of Washington and state officers named as parties in Continental Illinois National Bank and Trust Co. of Chicago, et al. v. State of Washington, et al. and Don't Bankrupt Washington Committee, Intervenor, and United States v. State of Washington and Don't Bankrupt Washington Committee, Intervenor, Ninth Circuit Court of Appeals #82-3404, having considered all matters relating to the availability of review by the United States Supreme Court and the contractual undertaking by the Washington Public Power Supply System under this agreement, hereby promises and agrees not to seek review by the United States Supreme Court. This agreement does not preclude the State from participating in further proceedings in this litigation if the court should order further proceedings nor does it preclude the state from expressing its views to the United States Supreme Court if the Court accepts for review that which is sought by any other party to the litigation.

AGREED TO THIS 11th day of February, 1983.

Robert L. Ferguson
Washington Public Power
Supply System

Ken Eikenberry
Attorney General
State of Washington

SIDLEY & AUSTIN
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
1722 EYE STREET, N.W.
WASHINGTON, D.C. 20006
TELEPHONE 202: 429-4000
TELEX 89-463

ONE FIRST NATIONAL PLAZA
CHICAGO, ILLINOIS 60603
TELEPHONE 312: 853-7000
TELEX 25-4364

2049 CENTURY PARK EAST
LOS ANGELES, CALIFORNIA 90067
TELEPHONE 213: 553-8100
TELEX 18-1391

9 HOLLAND PARK
LONDON, W11 3TH, ENGLAND
TELEPHONE 01: 727-0132
TELEX 21781

P.O. BOX 190
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TELEX 5266

P.O. BOX 4619
DEIRA, DUBAI - U.A.E.
TELEPHONE 9714-280194
TELEX 47216

Founded in 1866 as
Williams & Thompson

February 25, 1983

Mr. Alexander L. Stevas
Clerk
United States Supreme Court
Washington, D.C. 20543

Re: State of Washington, et al. v. Continental Illinois National Bank & Trust Company, et al.; and State of Washington, et al. v. United States of America

Dear Mr. Stevas:

Pursuant to Rule 12.3, Rules of the Supreme Court, I am hereby docketing the above-captioned case in this Court on behalf of The Don't Bankrupt Washington Committee, intervenor-appellant, by filing with you an appearance form, a check for $200 as required by Rule 45(a), 40 copies of a jurisdictional statement, and a certificate of service as required by Rule 28.

Pursuant to Rule 10.4 of this Court, this letter shall also serve to inform you that it is the belief of intervenor-appellant that the State appellants below (the State of Washington, the Governor of Washington, John Spellman, the Secretary of State of Washington, Ralph Munro, and the Attorney General of Washington, Kenneth Eikenberry) have no interest in the outcome of this appeal and do not intend to file a jurisdictional statement. A copy of this letter -- which constitutes the notice required by Rule 10.4 -- is also being served on the parties below as indicated in the attached certificate of service.

Thank you for your cooperation in this matter.

Sincerely,

Benjamin W. Heineman, Jr.

BWH/kr
Enclosures

cc: The Solicitor General
Richard K. Willard
William R. Squires
Franklin P. Auwarter
Kenneth O. Eikenberry

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TELEPHONE 9714-283194
TELEX 47216

Founded in 1866 as
Williams & Thompson

March 1, 1983

The Honorable Rex E. Lee
Solicitor General of the United States
United States Department of Justice
Room 5143
10th and Constitution Avenue, N.W.
Washington, D.C. 20530

Franklin P. Auwarter, Esq.
Mayer, Brown & Platt
231 South LaSalle Street
Chicago, Illinois 60604

William R. Squires, Esq.
Davis, Wright, Todd, Riese & Jones
4200 Seattle-First National Bank Bldg.
Seattle, Washington 98154

Re: The Don't Bankrupt Washington Committee v. Continental Illinois National Bank and Trust Company, Seattle-First National Bank and Morgan Guaranty Trust Company of New York, and the United States of America, No. 82-1445

Dear Messrs. Lee, Auwarter and Squires:

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Since the State appellants have decided not to appeal, the Supreme Court Clerk's office asked the Committee to change the cover of the Jurisdictional Statement. I am also, therefore, enclosing a photo-copy of the revised cover. Except for the change on the cover, and a small conforming change on page one of the Jurisdictional Statement, the

copies of the Jurisdictional Statement served on you are identical to those now in the possession of the Court. (The Jurisdictional Statement was docketed with the Court on February 25, 1983 as required by the stipulation between the parties, and the copies with the revised cover were presented to the Clerk on February 28, 1983.)

Sincerely,

Ben W. Heineman, Jr.

BWH/kr
Enclosures

cc: Richard K. Willard, Esq.

COPY RECEIVED
FEB 18 1982
By _____

RECEIVED
FEB 19 1982
Office of Clerk
U. S. District Court
Tacoma, Washington

RECEIVED
JUDGE'S OFFICE
FEB 18 1982

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, et al.,

Plaintiffs,

v.

THE STATE OF WASHINGTON, et al.,

Defendants.

THE DON'T BANKRUPT WASHINGTON COMMITTEE,

Applicant for Intervention as Defendant

Civil Action No. C 82-94 T

MOTION OF THE DON'T BANKRUPT WASHINGTON COMMITTEE TO INTERVENE AS A DEFENDANT

The Don't Bankrupt Washington Committee moves for leave to intervene as a defendant in the above-captioned action

Califano, Ross & Heineman
1575 Eye Street, N.W.
Washington, D.C. 20005
(202) 789-8800

Riddell, Williams, Bullitt & Walkinshaw
4400 Seattle-First National Bank Building
1001 Fourth Avenue
Seattle, Washington 98154
(206) 624-3600

LAW OFFICES
CALIFANO, ROSS & HEINEMAN
1575 EYE STREET, N.W.
WASHINGTON, D.C. 20005

pursuant to Federal Rule of Civil Procedure 24(a) (intervention of right) or, alternatively, pursuant to Federal Rule of Civil Procedure 24(b) (permissive intervention).

A Memorandum in support of this Motion to Intervene and other supporting materials are attached and are incorporated by reference herein. A Proposed Answer to Plaintiffs' Complaint is also being filed with this Motion as required by Federal Rule of Civil Procedure 24(c).

This suit challenges the validity of Initiative 394, incorporated in Chapter 6, 2nd Ex. Sess., Laws of 1981. As the organization that drafted, filed and sponsored Initiative 394 and that led the campaign for its passage, The Don't Bankrupt Washington Committee has the right to intervene under Rule 24(a) because it has a fundamental interest in the subject of the litigation, because that interest will obviously be impaired if Initiative 394 is declared unlawful and because its interest will not be adequately represented by the named defendants, none of whom supported the Initiative and one of whom publicly opposed it. Alternatively, the Committee should be allowed to intervene permissively under Rule 24(b) because it will present issues of law and fact in common with those likely to be joined between plaintiffs and the named defendants.

Counsel for the named defendants have stated to counsel for the Don't Bankrupt Washington Committee that the named defendants will, in the very near future, file a memorandum in support of the Committee's motion to intervene as defendant.

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[illegible]

Respectfully submitted,

Stimson Bullitt

Joseph A. Califano, Jr.

Benjamin W. Heineman, Jr.

John A. Siliciano

Stimson Bullitt
Riddell, Williams,
Bullitt & Walkinshaw
4400 Seattle-First National
Bank Building
1001 Fourth Avenue
Seattle, Washington 98154
(206) 624-3600

Joseph A. Califano, Jr.
Benjamin W. Heineman, Jr.
John A. Siliciano
Califano, Ross & Heineman
1575 Eye Street, N.W.
Washington, D.C. 20005
(202) 789-8800

Counsel for
The Don't Bankrupt Washington Committee,
Applicant for Intervention As Defendant

Dated: February 18, 1982

RECEIVED

FEB 18 1982

Office of Clerk
U. S. District Court
Tacoma, Washington

COPY RECEIVED

FEB 18 1982

DAVIS, WRIGHT, TODD, RIESE & JONES

By _____

RECEIVED
JUDGE'S OFFICE

FEB 18 1982

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, et al., Plaintiffs, v. THE STATE OF WASHINGTON, et al., Defendants, THE DON'T BANKRUPT WASHINGTON COMMITTEE, Applicant for Intervention.	Civil Action No. C 81-94T AFFIDAVIT OF STEVE ZEMKE

STATE OF WASHINGTON)
) ss
County of)

STEVE ZEMKE, being first duly sworn upon oath, does depose and say:

1. I am a resident of the State of Washington. For approximately two years I have been involved nearly full-time in the effort to enact Initiative 394 and its predecessor, Initiative 385. I was the initial sponsor of Initiative 394, on behalf of the Don't Bankrupt Washington Committee. I am the

LAW OFFICES
[illegible]
1919 EYE STREET, N.W.
WASHINGTON, D.C. 20006

Chairperson of the Don't Bankrupt Washington Committee, a corporation duly organized under the Laws of the State of Washington. I am also the registered agent for the Committee.

2. As a result of my intensive work with the Don't Bankrupt Washington Committee, I know, in minute detail, the history of Initiative 394 and the crucial role the Don't Bankrupt Washington Committee played in securing passage of the Initiative.

3. Chronologically, the following major steps led to the passage of Initiative 394 and its enactment into law as Chapter 6, Second Ex. Sess., Laws of 1981.

4. In the spring of 1980, an effort was mounted to place Initiative 385 on the November, 1980 election ballot. Initiative 385 was in many respects the predecessor of Initiative 394. That Initiative, like Initiative 394, was intended to place limits on the ability of joint operating agencies engaged in the construction of major public energy projects --and in particular on the Washington Public Power Supply System (WPPSS) -- to incur enormous debts and cost overruns without any accountability to those who would ultimately bear the burdens of such debts and without sufficient attention to the cost-effectiveness of the proposed projects.

5. The effort to collect sufficient signatures to place Initiative 385 on the ballot was, however, unsuccessful. As a consequence, many of those who had supported Initiative 385 held a series of meetings and discussions aimed at

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[illegible]

mounting a similar effort in 1981. As a result of these discussions, the Don't Bankrupt Washington Committee was formed in December 1980. See Exhibit A (attached). In order to participate in a second initiative effort, the Don't Bankrupt Washington Committee registered as a political committee with the Public Disclosure Commission of the State of Washington on December 24, 1980 pursuant to RCW 42.17. See Exhibit G (attached).

6. At the time it was formed, the Don't Bankrupt Washington Committee was an unincorporated association of individuals. Virtually all were utility ratepayers who could be directly affected by the WPPSS projects, as were most of our subsequent paid workers, volunteers and donors. Policy decisions of the Committee were made by an Ad Hoc Steering Committee. On March 20, 1981, the Committee was incorporated as Don't Bankrupt Washington. A certified copy of the Articles of Incorporation is attached hereto as Exhibit 1.

7. In preparing a new Initiative, the Don't Bankrupt Washington Committee solicited views and advice from approximately 300 individuals and groups, including members of the State Legislature and the Governor of Washington. During this period, the Committee also actively supported bills pending in the State Legislature which, if passed, might preclude the need for another initiative drive. In particular, the Committee sought passage of a bill that would subject the annual budget of WPPSS to approval by the State Legislature.

8. In the event that such legislation was not passed, the Committee, in January, 1981, prepared a draft of a new Initiative and began to seek funds for another State-wide effort. Such an initiative would serve both the interests of the ratepayers affected by the WPPSS projects and of the WPPSS bondholders.

9. On January 6, 1981, I filed an original draft of the proposed Initiative with the Secretary of State. See Exhibit B (attached). By letter of that date, the Secretary of State acknowledged receipt of the proposed Initiative.

10. On January 6, 1981, the measure was forwarded to the State Code Reviser, pursuant to RCW 29.79.015, for his review. The Code Reviser provided the Committee with various stylistic and substantive comments. Based on these comments and several meetings with the Code Reviser, a second and later a third draft of the proposed Initiative were produced. The third draft constituted Initiative 394 as it later appeared on petitions, election ballots, and as it was enacted into law. The Code Reviser's certificate of review is attached hereto as Exhibit C.

11. The third and final draft of the proposed Initiative was then filed with the Secretary of State along with the certificate of review from the Code Reviser. The proposed draft was given the formal title of Initiative Measure 394. A copy of the measure was then transmitted to the Attorney General for the formulation of a ballot title. The measure was given a ballot title by the Office of the Attorney General on January 30, 1981. See Exhibit D (attached).

12. Upon receipt of notice from the Secretary of State that a ballot title had been established, the Don't Bankrupt Washington Committee had 75,000 Initiative petitions printed at its expense. The cost of printing these petitions was several thousand dollars.

13. After the State Legislature failed to enact the legislation supported by the Don't Bankrupt Washington Committee, the effort was launched to obtain the 160,000 signatures needed to place Initiative 394 on the ballot. As part of this effort, the Don't Bankrupt Washington Committee enlisted the aid of approximately 2,000 volunteers, as well as the services of four full time staff members, to circulate the petitions for collection of signatures. Coordinators were appointed and Steering Committees were formed in all the major Counties of Washington. The canvassing effort lasted several months, encompassed the entire State and cost $25,000. The result of this effort was the timely filing of 11,470 petitions containing 185,984 signatures with the Secretary of State by July 3, 1981.

14. The petitions were then reviewed and the signatures counted by the Secretary of State. The Secretary of State certified the sufficiency of the petitions pursuant to RCW 29.79.230 on July 30, 1981.

15. The Office of the Attorney General prepared an explanatory statement relating to Initiative Measure 394, pursuant to RCW 29.81.020. See Exhibit E (attached). Additionally, committees were appointed pursuant to RCW

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29.81.050 to prepare arguments for and against approval of the measure. As the chairperson of the Don't Bankrupt Washington Committee, I was one of the persons appointed to the advisory committee to assist in the preparation of the Statement for Initiative 394 and of the Rebuttal of the Statement Against Initiative 394. A true and correct copy of the two pages of the official voter's pamphlet containing these statements is attached hereto as Exhibit F.

16. Subsequently, the Don't Bankrupt Washington Committee embarked on an expensive and time consuming effort to secure passage of Initiative 394. As part of this effort, the Committee solicited and received approximately $215,000 in contributions from about 3,400 donors. These contributions were used to hire media and polling consultants, to purchase television and radio time, to pay for leaflets and other printings, and to pay for seven full-time and several part time staff members. Approximately 2,000 volunteers assisted the Don't Bankrupt Washington Committee during the campaign. The Committee also arranged for speakers and sought support for the measure in a wide variety of forums. For example, representatives of the Committee engaged in television and radio debates and wrote newspaper columns.

17. None of the defendants named in plaintiff's Complaint actively supported the Initiative. Governor Spellman publicly opposed the Initiative.

18. At the election held November 3, 1981, Initiative Measure 394 received 532,178 votes for its passage (58 percent of those voting) and 384,419 votes against its passage (42

LAW OFFICES
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percent of those voting). On December 3, 1981, the Secretary of State certified the results of the election and the Governor issued his proclamation declaring its passage, pursuant to RCW 29.62.130. See Exhibit H (attached).

19. Because certain well-funded groups had strongly opposed passage of Initiative 394 and reportedly spent as much as $1.3 million during the campaign, the Don't Bankrupt Washington Committee believed that a court challenge to the Initiative was likely. The officers and directors of the Committee recognized that as individuals and as an organization they had a special obligation to the thousands of supporters of the Initiative to whom they had made personal appeals and from whom they had received contributions of time, effort, and money. The Committee recognized a similar obligation to the hundreds of thousands of voters who had participated directly in the initiative process and who had supported the measure at the polls. To discharge these obligations, the Don't Bankrupt Washington Committee determined early in 1982 that it would seek to intervene as a defendant in any suit challenging the validity of Initiative 394.

20. Utility ratepayers, who are ultimately responsible for paying for the cost of constructing WPPSS Projects 1-3, have been active in the work of the Committee and have contributed money to the Committee. At least one bondholder of WPPSS Project 1 Bonds donated money to the campaign and spoke out at debates and in other forums in support of the Initiative. It is likely that other holders of WPPSS bonds for Projects 1-3 were among the 185,984 who signed petitions to get

LAW OFFICES
[illegible]

Initiative 394 placed on the ballot, were among the 3400 individuals who donated money to the Committee, or were among the 532,178 citizens who voted for the Initiative.

DATED This 17 day of February, 1982.

Steve Zemke
STEVE ZEMKE

SUBSCRIBED and SWORN to before me this 17th day of February, 1982.

Thomas Bullitt
NOTARY PUBLIC in and for the State of Washington residing at Seattle

LAW OFFICES
[illegible]

Exhibit A

Don't Bankrupt Washington!

Support a Vote on Energy Spending.

Dear Friend of Initiative 385,

Little has changed with WPPSS (the Washington Public Power Supply System) since last spring's effort to put I-385 on the Nov. ballot. Little, that is, except ever rising costs. A month ago costs jumped $1.4 billion alone, to a new high of $17.3 billion for the 5 nuclear plants under construction. Without public control over further bond sales, such as I-385 proposed, these costs will continue to rapidly rise.

We believe that something must be done to end WPPSS's blank check spending policy. Few of us can afford the drastic rate increases that will be needed for the next 30 years to pay off all the billions of dollars WPPSS is spending in our name.

That is why we have decided to continue last spring's Initiative 385 campaign by SAVE$ (Support a Vote on Energy Spending) to require voter approval of any further bond sales by WPPSS. We have changed our name to the "Don't Bankrupt Washington" Committee. A redrafted version of I-385 will be filed in January as a new initiative. Over 160,000 signatures will need to be collected by July to place the initiative on the Nov. 1981 ballot.

We need your help and support now to have a successful campaign. To print up initiatives, open an office, pay staff, and do mailings, about $5,000 will be needed by the end of January. Will you help us to bring WPPSS under voter control by sending us a generous contribution today? Also please check off on the volunteer form how else you can help us.

Thank you.

Sincerely,

Steve Zemke

Steve Zemke
Chairperson
Don't Bankrupt Washington Committee

P.S. Please consider a contribution of $25 or more. Your Christmas gift to our campaign will have a long lasting effect on keeping down future electric rate increases. Checks should be made out to: "Don't Bankrupt Washington"

Exhibit A

Exhibit B

FILED
JAN - 6 1981
SECRETARY OF STATE
STATE OF WASHINGTON

AFFIDAVIT FOR

PROPOSED INITIATIVE TO THE PEOPLE

STATE OF WASHINGTON)
) ss.
COUNTY OF King)

Steve Zemke, being first duly sworn, says: he is a duly registered and legal voter of the state of Washington residing at 2205 E. Howe, Seattle, WA 98112 and herewith submits a proposed initiative measure to the people in the form appended hereto and requests the Secretary of State to file the same, assign it an initiative measure number and that the Attorney General supply a ballot title. Tel no 324-4362

Steve Zemke

SUBSCRIBED AND SWORN to before me this 6 day of January, 1981.

Steve Zemke, Chairperson
Don't Bankrupt Washington
1812 E. Madison
Seattle, WA 98122

(206) 324-3185

Notary Public in and for
the state of Washington,
residing at _____.

Exhibit B

Exhibit C

FILED
JAN 2 0 1981
SECRETARY OF STATE
STATE OF WASHINGTON

OFFICE OF THE CODE REVISER
LEGISLATIVE BUILDING
OLYMPIA, WA. 98504

IN THE MATTER OF PROPOSED
INITIATIVE TO THE PEOPLE
relating to energy facilities

PETITIONER: Mr. Steve Zemke
2205 East Howe Street
Seattle, Washington 98122

CERTIFICATE OF REVIEW (pursuant to RCW 29.79.015)

I hereby certify that the petitioner's proposal was received in the office of the Code Reviser on January 6, 1981, that I have reviewed the proposal for form and style and that the recommendations thereon, if any, have been communicated to the petitioner.

Dated January 13, 1981

DENNIS W. COOPER
Code Reviser

By

STEPHEN L. JONES
Assistant Code Reviser

Exhibit D

OFFICE OF THE ATTORNEY GENERAL
Ken Eikenberry, Attorney General
Temple of Justice, Olympia, Washington 98504

January 30, 1981

FILED
JAN 30 1981
SECRETARY OF STATE
STATE OF WASHINGTON

Honorable Ralph Munro
Secretary of State
Legislative Building
Olympia, Washington 98504

ATTN: John J. Pearson
Asst. Supervisor of Elections

Re: Ballot Title for Initiative Measure No. 394

Dear Sir:

Pursuant to the provisions of RCW 29.79.040, as amended by section 2, chapter 118, Laws of 1973, 1st Ex. Sess., this office submits the following ballot title for Initiative Measure No. 394:

Shall public agencies obtain voter approval prior to issuing bonds for the construction or acquisition of major public energy projects?

Yours very truly,

FOR THE ATTORNEY GENERAL

MALACHY R. MURPHY
Deputy Attorney General

mg

Exhibit D

OFFICE OF THE ATTORNEY GENERAL

September 9, 1981

Honorable Ralph Munro
Secretary of State
Legislative Building
Olympia, Washington 98504

ATTN: Don Whiting
Elections Supervisor

Dear Sir:

Pursuant to our responsibilities under RCW 29.79.060 and .076 and RCW 29.81.020, we herewith submit the following explanatory statement for Initiative No. 394:

EXPLANATORY STATEMENT:

The law as it now exists:

While the state and local governmental units must, under certain circumstances, obtain voter approval to raise money through the issuance of general obligation bonds, there is no such requirement of voter approval for the issuance of revenue bonds payable only from the revenues derived from the specific project. The issuance of such revenue bonds now includes the financing of the construction of public energy projects.

Effect of Initiative 394 if approved into law:

This initiative would require a public agency of the state to obtain approval from its voters before selling any bonds to finance the construction or purchase of a major public energy project. A "major public energy project" is defined by the initiative to mean a facility or addition to a facility which generates more than 250 megawatts of electrical power. Projects under construction by July 1, 1982 would not be covered except any WPPSS projects, the construction budget of which exceeds certain limits.

If the applicant to build or purchase a project is a public utility district, a joint operating agency, a city,

OFFICE OF THE ATTORNEY GENERAL

or a county, an election to decide if the funds for the project may be expended shall be held among the voters of that jurisdiction, or the voters of the local government entities which comprise the joint operating agency. If the applicant is a public agency other than those listed above, the election shall be conducted on a statewide basis. The election would be for the purpose of setting the maximum amount of bond financing which is authorized for a major public energy project. Prior to the election, the applicant would have to make available for public comment a cost effectiveness study prepared by an independent consultant. The study would examine the project and the ability to meet electrical power demands of intended customers at a reasonable cost compared with other alternatives. Supporters and opponents of the project would be permitted to present their views in a Voters' Pamphlet produced by the Secretary of State. Public comment and other basic information about the project would also be included in the Voters' Pamphlet.

Very truly yours,

FOR THE ATTORNEY GENERAL

MALACHY R. MURPHY
Deputy Attorney General

mg

Initiative Measure 394

TO THE PEOPLE

Official Ballot Title:

Shall public agencies obtain voter approval prior to issuing bonds for the construction or acquisition of major public energy projects?

The law as it now exists:

While the state and local governmental units must, under certain circumstances, obtain voter approval to raise money through the issuance of general obligation bonds, there is no such requirement of voter approval for the issuance of revenue bonds payable only from the revenues derived from the specific project. The issuance of such revenue bonds now includes the financing of the construction of public energy projects.

Statement for

WHAT I-394 DOES

Initiative 394 requires that a public agency like the Washington Public Power Supply System (WPPSS) obtain voter approval before it could issue more bonds to build or acquire major public power projects.

WHY I-394?

Spending on WPPSS's five nuclear projects has grown from its first estimate of $4.1 billion to the current estimate of almost $24 billion dollars. There is now no direct accountability to the ratepayers who will pay the bills for WPPSS's runaway spending.

WHO'S SPENDING?

Most of WPPSS's spending spiral is caused by contractor cost overruns. Faulty management, flawed engineering and contract loopholes have driven up the costs of the projects. Neither the WPPSS Board nor the state legislature has been able or willing to control these contractors to halt their runaway spending.

WHO DO YOU TRUST?

People clearly should have the right to vote yes or no before public utilities sell bonds, since these bonds will have to be repaid through higher electricity rates. Washington's voters are quite capable of making a judgment on these issues just as they vote on bonds for school districts, sewer and water projects. We ought to trust the people to make these decisions, rather than the inexperienced WPPSS Board or the state legislature.

I-394 MAKES WPPSS ACCOUNTABLE TO YOU

Initiative 394 makes WPPSS and its contractors directly accountable to the ratepayers who will pay the bills. I-394 forces WPPSS to reform its management, scrutinize its contractors and halt this runaway spending of your money.

VOTE YES ON I-394!

Rebuttal of Statement against

Opponents misrepresent Initiative 394. The issue is *your right to vote* to control public spending. 1) Initiative 394 enables Washington voters to do what the WPPSS Board has failed to do—stop contractor cost overruns on WPPSS nuclear projects. 2) Initiative 394 holds WPPSS accountable by requiring *voter approval* of WPPSS construction budget before WPPSS spends YOUR money. 3) Initiative 394 assures a strong Washington economy, by preventing WPPSS from putting *you* in debt over your head.

Voters Pamphlet Statement Prepared by:

BLITHE BEDDER, State Senator; AL WILLIAMS, State Senator; NITA RINEHART, State Representative.

Advisory Committee: TOM BAKER, President, District 751, International Association of Machinists and Aerospace Workers; PAT FLOYD, Commissioner, Jefferson County Public Utility District; JOLENE UNSOELD, Citizen Lobbyist; ERIC SMITH, President, Local 1105, Retail Clerks Union; STEVE ZEMKE, Chairperson, Don't Bankrupt Washington Committee.

The effect of Initiative 394, if approved into law:

This initiative would require a public agency of the state to obtain approval from its voters before selling any bonds to finance the construction or purchase of a major public energy project. A "major public energy project" is defined by the initiative to mean a facility or addition to a facility which generates more than 250 megawatts of electrical power. Projects under construction by July 1, 1982 would not be covered except any WPPSS projects, the construction budget of which exceeds certain limits.

If the applicant to build or purchase a project is a public utility district, a joint operating agency, a city, or a county, an election to decide if the funds for the project may be expended shall be held among the voters of that jurisdiction, or the voters of the local government entities which comprise the joint operating agency. If the applicant is a public agency other than those listed above, the election shall be conducted on a state-wide basis. The election would be for the purpose of setting the maximum amount of bond financing which is authorized for a major public energy project. Prior to the election, the applicant would have to make available for public comment a cost effectiveness study prepared by an independent consultant. The study would examine the project and the ability to meet electrical power demands of intended customers at a reasonable cost compared with other alternatives. Supporters and opponents of the project would be permitted to present their views in a Voters' Pamphlet produced by the Secretary of State. Public comment and other basic information about the project would also be included in the Voters' Pamphlet.

NOTE: The ballot title and explanatory statement were written by the Attorney General as required by state law. The complete text of Initiative Measure 394 begins on page 14.

Statement against

Initiative 394 would create a costly, bureaucratic nightmare with disastrous consequences for every taxpayer, electricity user, worker and business in Washington.

The initiative creates complicated and expensive restrictions which may terminate major energy projects now under construction and those planned for the future. It restricts every type of major energy project, including hydro, nuclear, coal or alternative energy sources such as wind, solar and geothermal. Cutting through the nearly 2,000 words of the proposal, here is what it does:

- It requires frequent elections on energy bond issues costing as much as $1,000,000 per election – paid for by the taxpayers.
- It requires costly government studies, comparison projections, decommissioning analyses, and a special printing of millions of pamphlets – paid for by taxpayers and ratepayers.
- Without new generating capacity from plants now under construction, we face a devastating shortage of electricity in the near future. It will mean the immediate loss of thousands of jobs and the ultimate loss of hundreds of thousands of jobs as industry is faced with factory closures or limited production schedules because of severe energy shortages.

The cost of Initiative 394 could be staggering – at stake is the energy and economic future of Washington. As taxpayers and ratepayers, it will cost us an adequate supply of energy, hundreds of thousands of jobs, millions of dollars in elections and studies and could cost us billions of dollars in uncompleted energy projects and construction delays.

VOTE NO ON 394. IT'S A VERY EXPENSIVE PROPOSITION

Rebuttal of Statement for

I-394 is *not* a WPPSS measure. I-394 will *not* affect WPPSS management. I-394 does *not* scrutinize contractors. *I-394 does force* expensive, repeated elections which make no sense. Voters not affected could vote, while affected voters may be prohibited from voting. *I-394 does force* a shutdown of construction of vitally needed energy projects. *I-394 does jeopardize* every type of major energy project including vitally needed hydro, coal, nuclear and wind projects. VOTE NO on 394!

Voters Pamphlet Statement Prepared by:

RAY ISAACSON, State Representative; JACK SILVERS, Master, Washington State Grange; RANDY A. ROACH, Attorney primarily engaged in construction and surety bonding law.

Advisory Committee: JULIA BUTLER HANSEN, Former Member of Congress; MINER H. BAKER, Economist; ROBERT DILGER, Executive Secretary, Washington State Building and Construction Trades Council, AFL-CIO; DOROTHY KUNE, Civic Leader; WELLS McCURDY, Past Chairman, Association of Washington Business.

Exhibit G

TO THE STATE OF WASHINGTON

PUBLIC DISCLOSURE COMMISSION
[illegible] EVERGREEN PLAZA BUILDING
711 CAPITOL WAY
OLYMPIA, WASHINGTON [illegible]
PHONE: [illegible]

PDC FORM **C-1** REV 9/77

REGISTRATION STATEMENT FOR CANDIDATES AND POLITICAL COMMITTEES

THIS SPACE FOR OFFICE USE

PU DATE	DATE RECVD
DEC 23 1980	DEC 24 1980

Registration and campaign financial reporting is required for all political committees, clubs and similar organizations and for candidates for any elective office not expressly exempt. See instructions for exempt offices.

1. CANDIDATE OR COMMITTEE NAME
DON T BARKRUPT WASHINGTON COMMITTEE
ADDRESS 2205 E. HOWE
CITY SEATTLE, WA ZIP 98112

DATE PREPARED DEC. 15, 1980
FILE NUMBER

2. CHECK APPROPRIATE BOX
☒ This is initial filing
☐ Change in data previously reported

3. THIS POLITICAL COMMITTEE ☐ IS ☒ IS NOT A CONTINUING ORGANIZATION

DATE OF GENERAL OR SPECIAL ELECTION Nov 1981

4. PURPOSE OF CAMPAIGN, COMMITTEE OR ORGANIZATION

☐ Candidate or committee organized principally to support one candidate.
Candidate's name (last) _____ (first) _____ (M I) _____
Office sought _____
City or district _____ (County) _____ Party, if partisan office _____

☐ Political party organization, central committee, caucus, district or precinct club, etc.
Party affiliation _____ If supporting entire party ticket check here ☐
Otherwise attach list of candidates to be supported.

☒ Ballot proposition committee (initiative, referendum, bonds, special levy, recall or similar issue.)
Name of proposition VOTER APPROVAL FOR BOND SALES Ballot number _____ For or against _____

☐ Political action committee identified with, or whose contributors are employees or members of, a business, association, labor union or similar organization.
Name of business, association, union, etc. _____

☐ Other. Describe purpose _____

5. ALL RELATED OR AFFILIATED COMMITTEES, ORGANIZATIONS, BUSINESSES, ASSOCIATIONS, ETC.

NAME	ADDRESS	RELATIONSHIP OR AFFILIATION
NONE	—	—

6. OFFICERS OR RESPONSIBLE LEADERS OF COMMITTEE

NAME	ADDRESS	TITLE
STEVE ZEMKE	2205 E. HOWE, SEATTLE, WA 98112	Chairperson

7. CAMPAIGN OR COMMITTEE TREASURER (CANDIDATE MAY SERVE AS TREASURER)

NAME	ADDRESS	PHONE NO
STEVE ZEMKE (TEMPORARY)	2205 E HOWE SEATTLE, WASH	324-4368

8. CAMPAIGN DEPOSITORY

NAME	ADDRESS
NOT YET SELECTED	—

9. ADDITIONAL DEPOSITORIES (NO MORE THAN ONE PER COUNTY) AND DEPUTY CAMPAIGN TREASURERS

☒ NONE ☐ LISTED ON ADDITIONAL SHEET

10. CAMPAIGN RECORDS ARE OPEN FOR PUBLIC INSPECTION EIGHT DAYS PRIOR TO EACH ELECTION AT ADDRESS 2205 E HOWE, SEATTLE, WA 98112 HOURS 9 AM TO 11 AM

CONTINUE ON REVERSE

Exhibit G

11. FAIR CAMPAIGN PRACTICES. I have read the attached Code of Fair Campaign Practices.
- [X] I (We) will voluntarily comply with the principles of the Code.
- [ ] I (We) do not choose to subscribe to some or all of the provisions of the Code.

12. CAMPAIGN FINANCIAL REPORTING

Check one of the options described below. If option I or II is not checked, the candidate (committee) is obligated to follow option III, Full Reporting, and to report fully and in detail contributions and expenditures on the dates prescribed in the public disclosure law.

- [ ] **Option I** MINI REPORTING. (For candidates only. - Not available to political committees.)
  1. I will limit contributions or expenditures during this campaign to my filing fee of $_____ plus no more than $200 which includes charges for the voters pamphlet.
  2. These fees are _____ paid from my personal funds; or _____ paid by contributions.
  3. I will accept no contribution over $100 from a single source except my personal funds.
  4. I understand that no other campaign financial reports (PDC forms C-3 or C-4) are required.
  5. I understand that I am required to report my personal financial affairs (PDC form F-1 or F-1A).

- [ ] **Option II** ABBREVIATED REPORTING. (For candidates and political committees.)
  I (this committee) will use the Abbreviated Reporting System. I (we) will limit aggregate contributions and aggregate expenditures to $1,000 and will accept no contribution over $100 from a single source except from the candidates personal funds.

- [X] **Option III** FULL REPORTING. (For candidates and political committees.)
  I (this committee) will use the Full Reporting System.

*SEE ATTACHED INSTRUCTIONS AND PDC CAMPAIGN REPORTING GUIDE FOR DETAILED EXPLANATION OF OPTIONS.

13. STATEMENT AS TO DISTRIBUTION OF ANY SURPLUS CAMPAIGN FUNDS after the campaign or in the event of dissolution of committee. (Distribution must be reported as an expenditure on C-4 report.)
- [ ] Return to contributors
- [ ] Donate to registered charity
- [ ] Hold for future election campaign
- [ ] Give to other candidates or committee ($2,000 maximum)
- [ ] Reimburse candidate for loans or lost earnings (substantiation must accompany C-4 which reports payment.)
- [ ] Donate to State General Fund
- [X] Other. Specify:

Citizen organizations of similar purposes and goals as ours

14. I (We) understand that a record must be kept of the name, address and amount of each contributor and the name, amount and purpose of each expenditure. I (We) also understand that campaign financial records must be open for public inspection for two hours daily, Monday thru Friday, the last eight days prior to the election, as designated in line 10 of this form.

15. I (WE) UNDERSTAND THAT EXCEEDING THE LIMITATIONS OF THE OPTION CHOSEN WITHOUT NOTIFICATION AND PERMISSION PROVIDED IN CHAPTER 390-16 WASHINGTON ADMINISTRATIVE CODE PLACES ME (US) IN VIOLATION OF THE ACT AND SUBJECTS ME (US) TO THE CIVIL SANCTIONS OUTLINED IN RCW 42.17.390.

CERTIFICATION

I HEREBY CERTIFY THAT THE ABOVE IS A TRUE, COMPLETE AND CORRECT STATEMENT IN ACCORDANCE WITH CHAPTER 42.17 RCW.

16. CANDIDATE'S SIGNATURE	DATE	17. TREASURER'S SIGNATURE (IF A POLITICAL COMMITTEE)	DATE
		Stephen Funke	12/15/80

SEND ORIGINAL COPY OF THIS REPORT TO: PUBLIC DISCLOSURE COMMISSION
403 EVERGREEN PLAZA BLDG.
OLYMPIA, WA 98504

SEND DUPLICATE COPY TO: COUNTY AUDITOR WHERE CANDIDATE LIVES.
POLITICAL COMMITTEES SEND DUPLICATE TO AUDITOR WHERE TREASURER LIVES.

Exhibit H

State of Washington

JOHN SPELLMAN, Governor

OFFICE OF THE GOVERNOR

- - - - - - - - - - -

OFFICE OF

THE GOVERNOR

STATE OF WASHINGTON

- - - - - - - - - - -

A PROCLAMATION BY THE GOVERNOR:

WHEREAS, under the provisions of Section 1 and 1(a) of Article II of the Constitution of the State of Washington, there was submitted to the electorate of the State of Washington for their approval or rejection at the state general election held on the 3rd day of November, 1981, an initiative measure, identified as Initiative Measure 394 and entitled:

> "Shall public agencies obtain voter approval prior to issuing bonds for the construction or acquisition of major public energy projects?";

WHEREAS, Ralph Munro, as Secretary of State, has on the 3rd day of December, 1981, canvassed the votes cast upon this measure at that state general election and certified that 532,178 votes were cast in favor of Initiative Measure 394 and 384,419 votes were cast against Initiative Measure 394; and

WHEREAS, as appears from this certification, a majority of the votes cast on this proposition at the state general election were in favor of its adoption;

NOW, THEREFORE, I, John Spellman, Governor of the State of Washington, do hereby proclaim that the proposed law as set forth in Initiative Measure 394 was approved by the voters of the State of Washington.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Seal of the State of Washington to be affixed this 3rd day of December, 1981

John Spellman
Governor

ATTEST:

Ralph Munro
Secretary of State

Exhibit I

FILED
MAR 20 19[illegible]

ARTICLES OF INCORPORATION

The undersigned, for the purpose of forming a corporation under the non-profit laws RCW 24.03, of the State of Washington, state:

I

The name of the corporation shall be Don't Bankrupt Washington.

II

The term of existence shall be in perpetuity.

III

The purposes for which the corporation is organized is as follows:

1. Provide a process for citizen review and approval of proposed financing for major public energy projects.

2. Encourage development of energy sources that are cost effective and dependable.

3. Work for cost effective electrical energy rates.

4. Any additional purposes compatible with the first three purposes and in conformance with the IRS Code, Section 501(c)(4) and RCW 24.03.

IV

The address of the initial registered office of the corporation shall be:

1812 E. Madison Street, Seattle, Wa. 98122.

The name of the initial registered agent at the same address shall be:

Steve Zemke.

V

The number of directors constituting the initial Board of Directors shall be 5.

The names and addresses of the persons who are to serve as the initial directors are as follows:

Steve Zemke 2205 E. Howe St. Seattle, Wa. 98112

Bill Harrington 5640 45 SW Seattle, Wa. 98136

Joan Pelley 2508 SW 144 Pl. Seattle, Wa. 98166

Paul R. Ballard 18417 47 Pl. NE Seattle, Wa. 98155

Pam Sturgeon 7711 81st Ave. NE Seattle, WA. 98115

VI

In the event of dissolution of the corporation, the net assets are to be distributed as follows: to other organizations working to end the blank check spending policy of the Washington Public Power Supply System and working to maintain public power in the Pacific Northwest.

March 2, 1981	[signature]	2205 E. Howe St. Seattle, Wa. 98112
	[signature]	5640 45 Ave. SW Seattle, Wa. 98136
	[signature]	2508 SW 144 Pl. Seattle, Wa. 98166
	[signature]	18417 47 Pl. NE Seattle, Wa. 98155
	[signature]	7711 1st Ave. NE Seattle, Wa. 98115

Signed before me and notorized on March 2, 1981

[signature]

Melissa A. Thompson

notary for the County of King

D308253
FILE NUMBER

DOMESTIC

STATE OF WASHINGTON DEPARTMENT OF STATE

I, RALPH MUNRO, Secretary of State of the State of Washington and custodian of its seal, hereby certify that

ARTICLES OF INCORPORATION

of DON'T BANKRUPT WASHINGTON

a domestic corporation of Seattle, Washington,

was filed for record in this office on this date, and I further certify that such Articles remain on file in this office.

In witness whereof I have signed and have affixed the seal of the State of Washington to this certificate at Olympia, the State Capitol.

March 20, 1951

RALPH MUNRO
SECRETARY OF STATE

COPY RECEIVED

FEB 18 1982

DAVIS, WRIGHT, TODD, RIESE & JONES

By _____

RECEIVED
JUDGE'S OFFICE

FEB 18 1982

RECEIVED

FEB 18 1982

Office of Clerk
U. S. District Court
Tacoma, Washington

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, et al., Plaintiffs, v. THE STATE OF WASHINGTON, et al. Defendants. THE DON'T BANKRUPT WASHINGTON COMMITTEE, Applicant for Intervention as Defendant	Civil Action No. C 81-947T MEMORANDUM OF THE DON'T BANKRUPT WASHINGTON COMMITTEE IN SUPPORT OF MOTION TO INTERVENE AS A DEFENDANT

The Don't Bankrupt Washington Committee [hereinafter "the Committee"] submits this memorandum in support of its motion to

Califano, Ross & Heineman
1575 Eye Street, N.W.
Washington, D.C. 20005
(202) 789-8800

Riddell, Williams,
Bullitt & Walkinshaw
4400 Seattle-First National
Bank Building
1001 Fourth Avenue
Seattle, Washington 98154
(206) 624-3600

LAW OFFICES
CALIFANO, ROSS & HEINEMAN
1575 EYE STREET, N.W.
WASHINGTON, D.C. 20005

intervene as a defendant in the above-captioned matter which challenges the validity of Initiative 394. The Committee is a non-profit corporation established under the laws of Washington. See Appendix A, ¶ 6, Affidavit of Steve Zemke, Chairperson, Don't Bankrupt Washington Committee [hereinafter "Appendix A"].

"But for" the Don't Bankrupt Washington Committee, Initiative 394 would not exist. The Committee is the citizens' organization which drafted the measure, obtained the 160,000 signatures needed to place the Initiative on the ballot, provided publicity and arguments in favor of the Initiative, and raised the funds necessary to wage a vigorous campaign for its passage in the face of well-funded opposition. Appendix A, ¶¶ 4-18. The result of this sustained effort is the measure now being challenged in this Court -- Initiative Measure 394, incorporated in Chapter 6, 2nd. Ex. Sess, Laws of 1981.

The initiative process established by the laws of Washington, Washington State Constitution, Article II, § 1(a), allows the people of the State to speak directly, through a state-wide election, to significant issues affecting their lives. Those who serve as "drafter, sponsor, organizer and campaigner" for initiatives are vital to the effective operation of this instrument of direct democracy. Seattle School District No. 1 v. Washington, 473 F. Supp. 996, 1001 (W.D. Wash. 1979).[1/] Their motions for intervention as defendants have been granted when the initiative that

---

1/ The decision of the District Court was affirmed in part and reversed in part by the Court of Appeals for the Ninth Circuit, 633 F.2d 1338 (1980). The Court of Appeals did not disturb the District Court's ruling on the motion to intervene.

LAW OFFICES

they helped enact into law is challenged in Federal court. Id. See also, Fritz v. Gorton, 517 P.2d 911, 914-15, 83 Wash. 2d 275 (Sup. Ct. Wash.) (en banc) appeal dismissed sub nom. Simmons v. Gorton, 417 U.S. 902 (1974) (citizens groups supporting initiative allowed to intervene to assist Attorney General in defense; importance of initiative power to ensure public accountability).[1/]

The Don't Bankrupt Washington Committee is in precisely the same position as parties which this court has allowed to participate as Intervenor-defendants, pursuant to Rule 24 of the Federal Rules of Civil Procedure, in suits involving legal challenges to citizen initiatives enacted in state-wide elections.

I. THE COMMITTEE AND INITIATIVE 394

The Don't Bankrupt Washington Committee was organized in the fall of 1980 and incorporated in March, 1981 as a non-profit Washington corporation under the name "Don't Bankrupt Washington." This organization was formed in response to mounting public concerns over the efforts of the Washington Public Power Supply System [hereinafter "WPPSS"] to construct five nuclear power plants. Appendix A, ¶¶ 4, 5. The Committee was comprised of citizens of Washington, including utility ratepayers. Id. ¶¶ 6, 20. These citizens feared that the well-documented pattern of WPPSS mismanagement, schedule delays, enormous cost overruns, and the resulting need for repeated, massive public borrowings through bond issues would, in the decades to come, place an intolerable financial

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1/ The specific issue of the right of a sponsor of an initiative to intervene was presented in a writ of certiorari and decided by the Washington Court of Appeals in Fritz v. Gorton, 8 Wash. App. 658, 509 P.2d 83 (1973).

LAW OFFICES

burden on the utility ratepayers of Washington. Id. ¶ 4. See also Report of Washington State Senate Energy & Utilities Committee, Causes of Cost Overruns and Schedule Delays on the Five WPPSS Nuclear Power Plants (1981) [hereinafter "Senate Report"]. The Committee also feared that these problems could affect the security of the WPPSS bonds already issued and thus have an impact on the WPPSS financial structure that, ultimately, had to be supported over a suitable period of time by ratepayers. Id. ¶ 8.

. The Committee's concern was heightened by WPPSS's lack of public accountability. Under the law as it then existed, WPPSS did not need to obtain citizen approval before it incurred literally billions of dollars of indebtedness. See Appendix A, Exhibit E (Attorney General's Official Explanatory Statement). Indeed, under conservative assumptions, the cost of WPPSS's Projects 1, 2 and 3 had risen from an original estimate of $2.1 billion to $12.1 billion by mid-1981, and the estimated cost of all five WPPSS projects had ballooned from $4.1 billion to about $24 billion. These extraordinary 1981 cost estimates did not include interest on the debt. Moreover, the Committee believed that the decision of WPPSS to press for construction of all five plants might, in light of the changing economic conditions and energy needs of the Pacific Northwest, no longer be economically justifiable. See also Senate Report, supra, at 58-60.

To address these concerns, the Don't Bankrupt Washington Committee drafted Initiative 394 in January, 1981. Appendix A, ¶ 8. The Initiative had two major purposes with respect to WPPSS. First, it sought to render the WPPSS' Board of Directors accountable to utility ratepayers by requiring voter approval

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of future borrowings for those WPPSS projects whose costs had exceeded the agency's original cost projections by at least 200 percent. Second, in light of the unprecedented cost overruns, it sought to insure the economic integrity of those projects by requiring that WPPSS conduct a cost effectiveness study -- and that the public be allowed to comment on that study -- before WPPSS could seek authority from the ratepayers to issue additional bonds. The Committee believed that the Initiative would thus benefit both the utility ratepayers and the holders of WPPSS bonds by insuring that future WPPSS borrowings were financially sound. Appendix A, ¶ 8.

The Committee's efforts to secure voter approval of Initiative 394 were long and arduous. Id., ¶¶ 4-18. After drafting and revising the Initiative, id., ¶¶ 9-11, the Committee had to obtain at least 160,000 voter signatures in order to have the Initiative placed on the ballot. To meet this goal, the Committee used four full-time staff members and enlisted the aid of approximately 2,000 volunteers. Following a massive and expensive State-wide canvassing effort that lasted several months and that cost $25,000, id. ¶ 13, the Committee filed with the Secretary of State of Washington 11,470 petitions containing 185,984 signatures. Id.

After the Secretary of State certified the sufficiency of these signatures, the Don't Bankrupt Washington Committee assumed and exercised primary responsiblity over the campaign to secure passage of Initiative 394. Id., ¶ 15-16. This campaign, like the initial effort to have the Initiative placed on the ballot, was costly and time consuming. The Committee solicited contributions totaling approximately

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$215,000 from over 3,400 donors. Moreover, the Committee employed seven full time and several part time workers, as well as approximately 2,000 volunteers, in the campaign effort. Id. Through television and radio statements, as well as through an extensive door to door and leafleting campaign, the Committee argued the merits of Initiative 394. None of the defendants named in the complaint publicly supported Initiative 394, and one of them, the Governor, publicly opposed it. Id., ¶ 17. As a result of the Committee's effort, the voters of Washington on November 3, 1981 approved the measure by an overwhelming margin -- 532,178 voters to 384,419 votes (58 percent to 42 percent). On December 3, 1981, the Governor of Washington announced that the Secretary of State had certified its passage. Id. Exhibit H.

Because well-financed parties strongly opposed the Initiative and reportedly spent $1.3 million in that effort, id at ¶ 19, the Don't Bankrupt Washington Committee realized that a court challenge to the measure was almost certain to be brought. To insure that the Committee's extraordinary interest in the Initiative was represented and to help defend the overwhelming mandate accorded the Initiative by the voters of Washington, the Committee determined that it would seek to intervene as a defendant in any suit challenging the validity of the Initiative. Id.

Because of its unique, indeed indispensable, role in helping to secure passage of Initiative 394, the Committee respectfully submits that it satisfies the requirements for intervention of right pursuant to Rule 24(a), Fed. Rules of Civ. Pro., as well as the requirements for permissive intervention contained in Rule 24(b).

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II. INTERVENTION OF RIGHT

The requirements for intervention of right are set forth in Rule 24(a), which provides in pertinent part:

> Upon timely application, anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

In interpreting this language, courts have frequently emphasized the need for a liberal construction of Rule 24, see, e.g., Clark v. Sandusky, 205 F.2d 915, 919 (7th Cir. 1953), and have resolved doubts in favor of permitting intervention. Corby Recreation, Inc. v. General Electric Co., 581 F.2d 175, 177 (8th Cir. 1978); Kozak v. Wells, 278 F.2d 104, 111-112 (8th Cir. 1960).

The Committee satisfies the four requirements set forth in Rule 24(a), especially in light of the "liberal construction" which courts have given to the Rule.

A. Timely Application.

The Committee clearly has filed this motion to intervene in a timely manner, as required by Rule 24(a). Plaintiffs filed their complaint on December 4, 1981. The answer of the defendants named in the Complaint was not due until 10 days after disposition of their motion to dismiss the action for improper venue or, in the alternative, to transfer the action to the District Court for the Western District of Washington. Fed. R. Civ. Pro. 12(a). This venue motion was decided by the United States District Court for the

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Eastern District of Washington on February 11, 1982, when the case was ordered transferred to this Court. The Committee is filing its motion to intervene and its Answer at virtually the same time that the Attorney General is filing an Answer on behalf of the named defendants.

Obviously, at this nascent stage of the litigation, granting the Committee's motion to intervene will in no way prejudice the parties or delay the disposition of this law suit. Indeed, permitting the Committee to intervene as defendant may well speed the resolution of this litigation in light of the Committee's special role in formulating, sponsoring and securing passage of Initiative 394. See Seattle School District No. 1 v. Washington, 473 F. Supp. 996 (W.D. Wash. 1979); Fritz v. Gorton, 8 Wash. App. 658, 509 P.2d. 83 (Ct. Appls. Wash. 1973).

B. The Committee's Interest in the Action.

The Committee clearly satisfies the second requirement of Rule 24(a) that the intervenor have "an interest relating to the property or transaction which is the subject of the litigation." The Court of Appeals for the Ninth Circuit, in construing this portion of Rule 24(a)(2), has noted that the interest test is "basically a threshold one, rather than the determinative criterion for intervention." County of Fresno v. Andrus, 622 F.2d 436, 438 (9th Cir. 1980). Moreover, the Court of Appeals emphasized that the primary purpose of this "interest" requirement was to serve as a "'practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.'" Id., quoting Nuesse v.

Camp, 385 F.2d 694, 700 (D.C. Cir. 1967).[1/]

As the complaint makes clear, the only "subject of litigation" is the validity of Initiative 394. The Committee's interest in defending that Initiative is surely at least as direct, intense and comprehensive as the interests of any of the defendants named in plaintiffs' complaint. Each of the individuals named by plaintiffs to defend Initiative 394 is a defendant in this suit solely by virtue of his official capacity or the ministerial functions that he may be required to perform under Initiative 394.[2/] The Committee, in contrast, drafted Initiative 394, obtained sufficient signatures to have it placed on the

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1/ As a leading commentator has noted, the "central purpose of the 1966 amendment [to Rule 24] was to allow intervention by those who might be practically disadvantaged by the disposition of the action and to repudiate the view . . . that intervention must be limited to those who would be legally bound as a matter of res judicata." Wright & Miller, 7A Federal Practice and Procedure § 1908 at 514 (footnotes omitted).

2/ Defendant Verner Miller, County Auditor of Benton County, has no strong, direct interest in defending the validity of Initiative 394. His involvement, at best, relates only to local elections that might be held in Benton County pursuant to the Initiative. Defendant Ralph Munro, Secretary of State of the State of Washington, is involved in this litigation only because he is required to organize certain statewide as opposed to local elections which may be required by the Initiative. Defendant John Spellman, Governor of the State of Washington, publicly opposed the passage of Initiative 394. Initiative 394 does not create nor require the performance by him of any additional duties not previously required by law. Defendant Kenneth Eikenberry, Attorney General of the State of Washington, is present in this litigation to fulfill his legal obligation to represent the State and its officers and employees when they are sued, an obligation which must be discharged with respect to all the laws in the Washington State Code. RCW 43.10.030.

ballot, and campaigned vigorously for its passage.[1/]

The Court of Appeals for the Ninth Circuit, in County of Fresno v. Andrus, supra, specifically concluded that intervention under Rule 24(a)(2) was appropriate under closely analogous circumstances. In that case, National Land for People, Inc. (NLP), a small organization of farmers, had successfully sued the Secretary of the Interior to compel him to promulgate certain regulations. When the Secretary promulgated those regulations and was subsequently sued by the County of Fresno and other plaintiffs, NLP sought to intervene as a defendant under Rule 24(a). In reversing the District Court's denial of NLP's motion to intervene, the Court of Appeals concluded that the "interest" component of Rule 24(a)(2) was satisfied because "NLP in fact is responsible for the regulations being promulgated in the first instance." 622 F.2d at 438. The Committee stands in a very analogous position, since the Committee, in almost every respect, is "responsible for" the formulation, presentation and voter approval of Initiative 394. The Committee therefore clearly has a Rule 24(a)(2)

1/ As the sponsor of Initiative 394, the Committee filed the proposed measure with the Secretary of State, pursuant to RCW 29.79.010. It conferred with the Code Reviser as to the appropriate style, form and wording of the measure, pursuant to RCW 29.79.015. When the measure was assigned a number and a title, it was the responsibility of the Committee to have petitions printed, and to comply with the technical requirements of Chapter 29.79 RCW regarding the form of the petitions and the procedures for collecting signatures. The Committee was also vitally concerned with and involved in formulating the statements in support of the measure which were included in the Official Voter's Pamphlet, pursuant to Chapter 29.81 RCW. By filing as a political committee, the Committee assumed the responsibilities and potential liabilities imposed by Washington's Public Disclosure Law. See generally, RCW 42.17.030 -- RCW 42.17.130 and RCW 42.17.392 -- 42.17.400. See also, Appendix A, ¶¶ 9-11.

"interest" in defending that Initiative from attack.[1/]

C. Impairment of Ability to Protect Interest.

It is also apparent that the resolution of plaintiffs' action "may as a practical matter impair or impede" the Committee's ability to protect its interests within the meaning of Rule 24(a)(2). Plaintiffs concede the applicability of Initiative 394 to Washington Public Power Supply System Nuclear Projects 1, 2 and 3, see Complaint ¶ 24, and seek "a declaration that Initiative 394 is unconstitutional and invalid." Id., Prayer for Relief. Obviously, a decision in favor of plaintiffs will do more than simply "impair or impede" the Committee's interest in the Initiative. For the act to be held unconstitutional or otherwise unlawful would constitute a complete defeat for the Committee and those whom it represents. Moreover, a decision in favor of plaintiffs will also impair other specific interests which the Committee, as an

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1/ In fact, the Ninth Circuit Court of Appeals has concluded that the "interest" component of Rule 24 is satisfied in analogous cases where the link between the intervenor and the subject of the litigation is considerably less direct and intense. In Idaho v. Freeman, 625 F.2d 886 (9th Cir. 1980), the Court of Appeals concluded that the National Organization of Women (NOW) could intervene as defendant under Rule 24(a) in a suit brought by Idaho and Arizona challenging federal procedures for ratification of the proposed Equal Rights Amendment (ERA). The Court reasoned that NOW's "interest in the continued vitality of ERA" satisfied the "interest" component of Rule 24. Surely, if, under the Ninth Circuit's analysis, NOW's interest in an amendment proposed by Congress is sufficient to justify intervention, the Committee's interest in an initiative which it drafted, campaigned for, and secured passage of must also satisfy the "interest" test of Rule 24(a).

See also, Fritz v. Gorton, 8 Wash. App. 658, 509 P.2d 83, 85-86 (Ct. Appls. Wash. 1973) (broad approach to "interest" requirement and sponsors of initiative have special interest).

organization comprised primarily of utility ratepayers, sought to advance through the Initiative. Ratepayers ultimately bear the burden of WPPSS's debts, and, if the Initiative is overturned, they will lose the opportunity to have cost effectiveness studies made of proposed expenditures and to have a vote of ratepayers on debt limits for the additional expenditure of funds for the construction of such facilities.

In analogous circumstances, the Court of Appeals for the Ninth Circuit has readily concluded that the "impairment" requirement of Rule 24(a)(2) was satisfied. For example, in County of Fresno v. Andrus, supra, the Court found that the interest of National Fund for People, Inc. would be impaired, within the meaning of Rule 24(a), if it was denied intervention in a suit challenging the promulgation of regulations it had forced, through an earlier suit, to be issued in the first place. 622 F.d at 438. In Idaho v. Freeman, supra, page 10, note 1, the Court concluded that the National Organization of Women's interest in the continued vitality of the Equal Rights Amendment "would as a practical matter be significantly impaired by an adverse decision," in a suit brought by States challenging federal procedures affecting the States' vote on the Amendment. 625 F.2d at 887. Because the Committee has an analogous, if not stronger, interest in the subject matter of this litigation, there can be little doubt that the "impairment" requirement of Rule 24(a)(2) is met.

D. Adequacy of Representation.

If the first three requirements enumerated in Rule 24(a) -- a timely application, an interest in the subject of the litigation, and a potential impairment of the ability to protect that interest -- are satisfied, intervention is of right "unless the applicant's interest is adequately represented by existing parties." The United States Supreme Court, in addressing this

requirement, has cautioned against an unduly restrictive interpretation.

> "The requirement of the Rule is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." Trbovich v. United Mine Workers of America, 404 U.S. 528, 538 n. 10 (1972).

See also, Fritz vi Gorton, 8 Wash. Appls. 658, 509 P.2d. 83, 86 (Ct. Appls. Wash. 1973) (burden on intervenor "minimal").

Similarly, in County of Fresno v. Andrus, supra, the Court of Appeals for the Ninth Circuit has ruled that:

> "[a] would-be intervenor is adequately represented if: (1) the interests of a present party to a suit are such that it will undoubtedly make all of the intervenor's arguments; (2) the present party is capable of and willing to make such arguments; and (3) the intervenor would not offer any necessary element to the proceedings that the other parties would neglect." 622 F.2d at 438-439. (Emphasis added).

The Court of Appeals has also observed that the burden of establishing that representation may be inadequate "is not a heavy one." Smith v. Pangilinan, 651 F.2d 1320, 1325 (9th Cir. 1981). Finally, courts have concluded that the willingness of the potential intervenor to assume the costs and burdens of litigation, as well as the support of the party on whose behalf intervention is sought, are factors that aide a finding that representation of the potential interventor's interest may not be adequate if intervention is denied. Wright & Miller, supra, § 1909, at 522-523; Smith v. Pangilinan, supra, 651 F.2d at 1325.[1/]

1/ Moreover several courts and commentators have concluded that once a potential intervenor has satisfied the first three requirements of Rule 24(a), the burden of persuasion shifts to those parties opposing intervention to show that the representation of the potential intervenor is adequate. Wright & Miller, 7A Federal Practice and Procedure § 1909, at 521; Smuck v. Hobson, 408 F.2d 175, 181 (D.C. Cir. 1969); Nuesse v. Camp., supra, 385 F.2d at 702.

The Committee recognizes, of course, that the Attorney General of the State of Washington is named as a defendant and is required by statute to defend the Initiative. RCW 43.10.030. The Committee is also aware of decisions by several courts suggesting that, absent a showing of collusion or bad faith, a State's Attorney General or similar official is usually presumed capable of adequately representing the citizenry of the State.[1/] Moreover, the Committee does not wish to suggest that the Attorney General will not discharge his statutory duty to defend the Initiative.

Nonetheless, analysis of the three "conditions" set out by the Court of Appeals in County of Fresno v. Andrus for determining "adequacy of representation" in the technical, Rule 24(a)(2) sense, page 13, supra, reveals that none of those conditions is satisfied in this litigation and thus intervention of right should be granted. It should be emphasized that, if only one of those three conditions is not satisfied, intervention of right is required.

First, in light of plaintiffs multiple attacks against Initiative 394 -- the Complaint contains seven separate counts and numerous sub-theories -- there can be no assurance that the named defendants will "undoubtedly" raise all of the arguments in favor of the Initiative that the Committee seeks to advance. See County of Fresno v. Andrus, supra, 622 F.2d at 438-439; National Resources Defense Council v. Costle, 561 F.2d 904, 911-913 (D.C. Cir. 1977); New York Public Interest Research Group, Inc. v. Regents of Univ. of State

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1/ See, e.g., Pennsylvania v. Rizzo, 530 F.2d 501, 505 (3d Cir.), cert. denied, 426 U.S. 921 (1976); Illinois v. Bristol-Myers Co., 470 F.2d 1276 (D.C. Cir. 1972).

of N.Y., 516 F.2d 350, 352 (2d Cir. 1975). This case raises important statutory and State and Federal constitutional questions of first impression. Given the multiple legal attacks directed at Initiative 394 raising novel questions of law, it can hardly be certain, and indeed is not likely, that the named defendants will "undoubtedly" present to the Court all the legal theories and arguments which the Committee, as intervenor-defendant, would advance. Similarly, although the Committee shares the desire of the plaintiffs and named defendants to stipulate to as many facts as possible and to dispose of the litigation on preliminary motions if possible, this controversy arises out of an extraordinarily complex factual context. Again, it is not likely that the named defendants will "undoubtedly" assess the relationship and relative importance of the facts in the way that the Committee might present them. In sum, in a multi-count test litigations of this type, there is a reasonable likelihood that the intervenor-defendant will present important additional arguments on the law and the facts.

Second, as noted in the Memorandum of State of Washington in Support of Motion to Dismiss or Transfer, filed by the Attorney General, the State of Washington is "in a fairly severe fiscal situation." Memorandum at 8. The Attorney General is charged with responsibility for a wide range of litigation involving the State of Washington, and, given the State's fiscal problems, must inevitably make difficult decisions concerning the amount of resources to be devoted to a particular case. In contrast, the fundamental concern of the Committee is defending the validity of Initiative 394, and the Committee can focus all of the resources at its disposal to insure that the Initiative is ultimately upheld.

Thus, to the extent that the resources of the State available to defend the Initiative are limited, the named defendants may not be "capable" of making all relevant arguments, County of Fresno v. Andrus, supra, and the Committee therefore can serve as a willing and necessary co-defendant in this litigation.

Indeed, attorneys for the Committee and the named defendants have already had productive initial discussions about the litigation which suggest that a creative collaboration and meaningful division of labor with respect to the highly complex set of legal and factual issues could result if the Committee's motion to intervene is granted. For example, because some counsel for the Committee are located in Washington, D.C., they may have greater access, at a reduced cost, to legal and factual materials in that city (i.e., relating to the Federal role in the WPPSS projects) or in New York (i.e., bond analysts, investment bankers, and bond counsel).

Third, the Committee believes that it would "offer [a] necessary element to the proceedings." County of Fresno v. Andrus, supra, 622 F.2d at 439. The Committee is in a unique position in that its efforts in large part constitute the legislative history of Initiative 394. The Washington State Supreme Court, in construing initiative measures, has emphasized the need to ascertain the collective intent of the voting populace, and state courts have looked to a variety of sources in seeking that intent. Washington State Department of Revenue v. Hoppe, 512 P.2d, 1094, 82 Wn. 2d 549, (1973); Fritz v. Gorton, 517 P.2d 911, 917-919, 83 Wash. 2d. 275 (Sup. Ct. Wash 1974) (en banc). To the extent that the interpretation or legislative history of the Initiative are in issue, the Committee is in a unique position to assist the Court. It has the ability, possessed by no other party

to this litigation, to represent most comprehensively the public concerns and the history that led to the passage of the Initiative. See, Bass v. Richardson, 338 F. Supp. 478, 492 (S.D.N.Y. 1971).[1/]

Accordingly, the Committee's motion to intervene as of right should be granted pursuant to Rule 24(a)(2), Fed. R. Civ. Pro.[2/] As noted, to the extent that this Court regards the question as a close one, it should, consistent with established judicial practice, resolve such doubts in favor of permitting intervention. Corby Recreation, Inc. v. General Electric Co., supra, 581 F.2d at 177; Kozak v. Wells, supra, 278 F.2d at 111-112.

1/ Moreover, as noted above, Washington, D.C. counsel for the Committee have greater access to legal and factual materials in Washington and New York than attorneys for the named defendants.

2/ Other federal courts, in evaluating the "adequacy of representation" question, have looked at the respective "interests" of the named defendants and the intervenor-defendant. These courts have held that there is not adequacy of representation when the official, named defendants have general responsibility but not the particular interest of the intervenor-defendant. In other words, the respective interests, while not adverse, "are disparate," Planned Parenthood v. Citizens for Community Action, 558 F.2d 861 (8th Cir. 1977). See also, Associated General Contractors v. Secretary of Commerce, 459 F. Supp. 766 (C.D. Cal., 1978), judgment vacated on other grounds, 448 U.S. 908 (1980); National Farm Lines v. ICC, 564 F.2d 381 (10th Cir. 1977).

In this case, the interests of the named defendants, while not adverse, are clearly disparate from those of the Committee, because of the extensive "but for" role the Committee played in securing enactment of Initiative 394 and because the Committee has strongly held, publicly expressed views on the procedural (ratepayer vote) and substantive (cost-effectiveness) requirements that should be met before additional indebtedness is authorized by the WPPSS Board of Directors. None of the named defendants has expressed such views.

III. PERMISSIVE INTERVENTION

If the Court determines that intervention of right is not appropriate in this case, the Committee requests that it be granted permissive intervention under Rule 24(b). That Rule provides in pertinent part.

> "Upon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

The requirements for permissive intervention under Rule 24(b) are obviously less restrictive than the requirements of Rule 24(a). A court need only find the motion to intervene is timely, that it will not unduly delay the litigation or prejudice the existing parties and that the applicant's defense and the main action have at least one common question of law or fact.

The Committee's motion to intervene clearly satisfies the requirements of Rule 24(b).

First, as previously noted, the motion is timely. It is being filed, along with a proposed Answer, at virtually the same time as the Answer of the named defendants.

Second, intervention will not unduly delay or prejudice the adjudication of the rights of the original parties. As noted, the Committee shares the view, expressed by both the plaintiffs, see Memorandum of Plaintiffs in Opposition to Defendant's Motion to Dismiss or Transfer, at 5, and the defendants, see Memorandum of State of Washington in Support of Motion to Dismiss or Transfer, at 8, that every effort should be made to define sharply the relevant factual issues and stipulate to as many facts as possible. The Committee also shares the desire of the named parties to expedite the resolution of the litigation. Indeed, the Committee believes that the litigation

can be terminated on the basis of preliminary motions. The Committee believes that it can promote the speedy and fair adjudication of this case by working collaboratively with the Attorney General and his staff in defending the Initiative and by bringing to bear the special expertise of the Committee with respect to the intent, scope and effect of the Initiative.

Finally, the third requirement of permissive intervention under Rule 24(b) -- that the "applicant's claim or defense and the main action have a question of law or fact in common" -- is clearly met. The Committee seeks to address those questions raised by plaintiffs' challenge to the Initiative and to demonstrate that, under either Federal or State law, Initiative 394 is a lawful exercise of the initiative power and was soundly conceived by the Committee.

Because the requirements of Rule 24(b) are satisfied, the disposition of this motion to intervene is committed to the sound discretion of the Court. Wright & Miller, 7A Federal Practice and Procedure § 1904. However, in exercising this discretion, the Court should be guided by several considerations. First, the general presumption in favor of intervention applies. Id. In addition, the Court should consider whether intervention is favored by any of the present parties to the litigation. Id., § 1913. Finally, the Court should give attention to other factors such as the risk of unduly complicating the proceedings, the benefits to the potential intervenor, the ability of the intervenor to protect its interests through other means, and the advantages that the intervenor might bring to the proceedings. Id.

In this litigation, those factors guiding the Court's discretion all favor intervention. The named defendants

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1010 5TH STREET, N.W.
WASHINGTON, D.C. 20005

support intervention by the Committee, and their counsel has informed counsel for the Committee that they intend to file a memorandum in support of the Committee's motion to intervene. Counsel for the Committee and the counsel for the named defendants intend to develop an effective and efficient strategy for defending the Initiative and for bringing this litigation to a prompt and just conclusion.

In addition, the Committee's fundamental interest in the outcome of this litigation can only be protected through intervention.[1/] The Committee's presence will not add to the complexity of this suit, which plaintiffs already have complicated by virtue of their multi-count complaint. Indeed, the Committee would hope to work with the named defendants in the important but hardly routine task of bringing analytic clarity to the complex legal and factual issues of first impression presented by this litigation.

Finally, the Committee's unique role in the Initiative process is a special reason for this Court to exercise its discretion in favor of intervention. This Initiative, unlike most legislation, originated not in the halls of the Washington Legislature, but in the offices of a group of ordinary citizens. These citizens, through the initiative process, sought to address what they perceived to be a major problem which the Legislature had failed to remedy. They expended extraordinary time and effort to convert the Initiative from an idea into a law. Their actions represent direct democratic action to

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1/ Considerations that govern intervention under Rule 24(a)(2) -- the nature of the applicant's interest in the litigation and the threat of impairment of that interest -- are generally relevant to the exercise of the Court's discretion under Rule 24(b) and, on these issues, the Committee incorporates by reference its previous analysis. See pp. 8-12, supra.

ensure public accountability, just as the State's initiative authority contemplated. It would be totally contrary to this democratic ideal to exclude the very citizens who were responsible for the passage of the Initiative from participating in its defense in a court of law through counsel of their choice.

CONCLUSION

In Seattle School District No. 1 v. Washington, 473 F. Supp. 996 (W.D. Wash., 1979), the Citizens for Voluntary Integration Committee (CIVIC) -- the "drafter, sponsor, organizer, and campaigner" for Initiative 350 -- was allowed to intervene as a defendant in a suit challenging the Initiative that was brought against the Attorney General and other officials. Id. at 1001.[1/] The Committee stands in precisely the same position.

Accordingly, for the reasons set forth above, the Committee respectfully requests that its motion to intervene as Defendant be granted.

1/ Similarly, in Fritz v. Gorton, 8 Wash. App. 658, 509 P.2d 83 (Ct. Appls. Wash. 1973) a citizens group that had sponsored and actively supported an initiative was allowed to intervene as of right and to work with the Attorney General in defending the measure. The Washington rule of civil procedure governing intervention in State cases is identical to Rule 24, Fed. R. Civ. Pro. See, Washington Civil Rule 24.

LAW OFFICES

Respectfully submitted,

Stimson Bullitt

Riddell, Williams,
Bullitt & Walkinshaw
4400 Seattle-First National
Bank Building
1001 Fourth Avenue
Seattle, Washington 98154
(206) 624-3600

Joseph A. Califano, Jr.

Benjamin W. Heineman, Jr.

John A. Siliciano

Califano, Ross & Heineman
1575 Eye Street, N.W.
Washington, D.C. 20005
(202) 789-8800

Counsel for Intervenor-Defendant
The Don't Bankrupt Washington Committee

Dated: February 18, 1982

RECEIVED
JUDGE'S OFFICE
MAR 19 1982

FILED IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
MAR 4 - 1982
BRUCE RIFKIN, CLERK
BY _____ DEPUTY

LODGED
MAR 1982

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, et al.,

Plaintiffs,

v.

THE STATE OF WASHINGTON, et al.,

Defendants.

THE DON'T BANKRUPT WASHINGTON COMMITTEE,

Applicant for Intervention

Civil Action No. C 82-947

DRAFT ORDER

Upon consideration of the Motion to Intervene as a Defendant of the Don't Bankrupt Washington Committee, and the Memorandum of Points and Authorities in support thereof, it is hereby

ORDERED that the Motion to Intervene as a Defendant of the Don't Bankrupt Washington Committee is granted.

Dated this 2 day of March, 1982.

United States District Judge

LAW OFFICES
COVINGTON & BURLING
888 16TH STREET, N.W.
WASHINGTON, D.C. 20006

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No. 82-1445

Office-Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE DON'T BANKRUPT WASHINGTON COMMITTEE,
Appellant,

v.

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, SEATTLE-FIRST NATIONAL BANK, MORGAN GUARANTY TRUST COMPANY OF NEW YORK, and THE UNITED STATES OF AMERICA,
Appellees.

On Appeal From the United States Court of Appeals for the Ninth Circuit

MOTION OF APPELLEES SEATTLE-FIRST NATIONAL BANK AND MORGAN GUARANTY TRUST COMPANY OF NEW YORK TO DISMISS OR AFFIRM

WILLIAM R. SQUIRES, III
4200 Seattle-First National Bank Building
Seattle, Washington 98154
(206) 622-3150

Counsel for Seattle-First National Bank and Morgan Guaranty Trust Company of New York

STEPHEN M. RUMMAGE
DAVIS, WRIGHT, TODD, RIESE & JONES
Of Counsel

March 24, 1983

QUESTIONS PRESENTED

1. Whether a municipal corporation's covenants to complete construction of energy generating facilities, made to holders of bonds payable from the revenues of those facilities, are substantially impaired by a state statute that conditions compliance with those covenants on the results of a popular referendum?

2. Whether a state statute that substantially impairs a municipal corporation's covenants by subjecting them to the electorate's veto violates the Contract Clause of the United States Constitution because it is not a reasonable and necessary means to serve a legitimate public purpose?

LIST OF PARENT COMPANIES, SUBSIDIARIES AND AFFILIATES

Seattle-First National Bank ("Seattle-First") is a wholly owned subsidiary of Seafirst Corporation. All of Seattle-First's subsidiaries are wholly owned, excluding director qualifying shares in certain instances. In addition, Seattle-First has no affiliates other than those wholly owned by its parent, Seafirst Corporation, or by one of its parent's wholly owned subsidiaries. Should the Court desire disclosure of these companies, Seattle-First will supplement its list of subsidiaries and affiliates.

Morgan Guaranty Trust Company of New York ("Morgan Guaranty") is a wholly owned subsidiary of J.P. Morgan & Co., Incorporated. Morgan Guaranty's subsidiaries (except wholly owned subsidiaries) are: Banco Morgan Finansa and Bank Morgan Labouchere N.V. Eleven subsidiaries are wholly owned by Bank Morgan Labouchere N.V. Morgan Guaranty has no affiliates other than those wholly owned by its parent, J. P. Morgan & Co., Inc., or by one of its parent's wholly owned subsidiaries. Should the Court desire disclosure of these companies, Morgan Guaranty will supplement its list of subsidiaries and affiliates.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE DON'T BANKRUPT WASHINGTON COMMITTEE,
Appellant,

v.

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, SEATTLE-FIRST NATIONAL BANK, MORGAN GUARANTY TRUST COMPANY OF NEW YORK, and THE UNITED STATES OF AMERICA,
Appellees.

On Appeal From the United States Court of Appeals for the Ninth Circuit

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MOTION OF APPELLEES SEATTLE-FIRST NATIONAL BANK AND MORGAN GUARANTY TRUST COMPANY OF NEW YORK TO DISMISS OR AFFIRM

Appellees Seattle-First National Bank and Morgan Guaranty Trust Company of New York (the "Trustees") respectfully move to dismiss this appeal or, in the alternative, to affirm the judgment of the court of appeals. Supreme Court Rule 16.1(c) and (d).

OPINIONS BELOW

The court of appeals' opinion (J.S. App. 1a-20a)[1] is reported at 696 F.2d 692. The district court's opinion (J.S. App. 21a-23a) is not reported.

JURISDICTION

The court of appeals entered judgment on January 11, 1983. The State of Washington, an appellant before the court of appeals, elected not to seek review by this Court. Appellant The Don't Bankrupt Washington Committee filed its jurisdictional statement on February 25, 1983, invoking this Court's jurisdiction under 28 U.S.C. 1254(2). As is more fully discussed in the Motion of Appellee Continental Illinois National Bank and Trust Company of Chicago to Dismiss or Affirm, however, appellant lacks standing to invoke the Court's appellate jurisdiction.

STATEMENT

The Washington Public Power Supply System (the "Supply System") is a municipal corporation and "joint operating agency" of the State of Washington. It comprises 19 public utility districts and four cities, all of which are also Washington municipal corporations. The Supply System is authorized by statute to construct and operate electric power plants and to issue revenue bonds to finance their construction. RCW 43.52.300; RCW 43.52.3411. Pursuant to that authority, it is currently building three nuclear power plants ("Projects 1, 2 and 3").[2]

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[1] References to the Jurisdictional Statement and its Appendix will be designated "J.S." and "J.S. App." The designation "Ex." refers to Exhibits, which were not given Clerk's Record numbers. The Clerk's Record is abbreviated "CR," and citations to the Amended Pretrial Order will be in the form "PTO," followed by the relevant paragraph number. The abbreviation "RP" refers to the report of proceedings before the district court.

[2] The Supply System in 1981 terminated construction on two other plants. They are not at issue in this case.

On November 3, 1981, Washington's voters passed Initiative 394, RCW Ch. 80.52 (the "Initiative"). The Initiative prevents the Supply System from issuing or selling bonds to finance completion of Projects 1, 2 and 3 without first obtaining authority in a popular election. Before passage of the Initiative, Washington law did not require direct voter approval for the issuance and sale of Supply System bonds, or for the expenditure of their proceeds.

This case involves the constitutionality of the Initiative as applied to the Supply System's contracts with the holders of revenue bonds previously issued to finance construction of Projects 1, 2 and 3. These bonds were issued and sold pursuant to a master Bond Resolution for each project.[3] Under Washington law, each Resolution is a contract between the Supply System and the purchasers of the billions of dollars of bonds issued to finance these projects. RCW 54.24.110; *see also* Res. 640 and 775, § 14.1 (Ex. 9, 10); Res. 769, § 15.1 (Ex. 8).

Bond purchasers require more than a simple promise of repayment. They therefore obtain additional security for their investment, which takes the form of covenants either requiring or limiting the issuer's actions. In this case, the bonds are revenue bonds, payable solely from income derived by the Supply System through its ownership and operation of each project. PTO (CR 170) ¶ 64. Because completed projects will produce electricity which can be sold to help generate income, the Supply System covenanted with bond purchasers that it

[3] Seattle-First, by the terms of Resolution 775, is Trustee for the holders of Project 3 bonds. Morgan Guaranty is Trustee for the holders of Project 1 bonds under Resolution 769. Under Resolution 640, Continental Bank is Trustee for the holders of Project 2 bonds and has filed, under separate cover, its own Motion to Dismiss or Affirm. The contractual obligations relating to the three projects are substantially the same and therefore will be discussed as a group.

could issue bonds to complete each project,[4] that it *would* issue and sell additional bonds in amounts sufficient to complete each project,[5] and that it *would* "construct [each project] to completion."[6] The covenant to complete was subject to one primary exception—the projects would not be completed if the Supply System and the Bonneville Power Administration ("Bonneville") jointly determined that the projects could not produce electricity consistent with Prudent Utility Practice, or, if they

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[4] Each Resolution provides, in the article entitled "COVENANTS TO SECURE BONDS":

> *Protection of Security.* The System is duly authorized under all applicable laws to create and issue the Bonds and to adopt this Resolution and to pledge the revenues and other moneys, securities and funds purported to be pledged by this Resolution in the manner and to the extent provided in this Resolution. (Res. 640 § 9.14; Res. 769, § 10.15; Res. 775 § 9.13) (Exs. 9, 8, 10).

The "Bonds" include *all* bonds "issued pursuant to the terms, conditions and limitations of [each] Resolution in series, in such amounts, and from time to time, as may be required to pay the Cost of Construction. . . ." Res 640 and 775, § 3.1 (Exs. 9, 10); Res. 769, § 4.1 (Ex. 8). Thus, the covenant of authority to issue "the Bonds" extends to bonds not yet issued, but which *will* be issued to pay "Costs of Construction."

[5] The Resolutions contain the following promise:

> The System hereby covenants and agrees that it will take all lawful measures required to issue and sell from time to time or at one time additional Series of Bonds to the extent required to enable the System to pay the remaining balance of the Costs of Construction. (Res. 640 and 775, § 3.4; Res. 769, § 4.4.) (Exs. 9, 10, 8).

[6] In each Resolution, the *first* covenant in the article entitled "COVENANTS TO SECURE BONDS" is to complete the project:

> The System will, subject to the provisions of the Project Agreement, (i) proceed with all reasonable diligence to and *will construct to completion* the Project and complete such construction at the earliest practical time . . . . (Res. 640, § 9.1; Res. 769, § 10.2; *see* Res. 775, § 9.1.) (Exs. 9, 8, 10) [Emphasis Added.]

In the case of Project 3, the covenant to complete is also subject to the Ownership Agreement. Res. 775, § 9.1 (Ex. 10).

disagreed, an independent consultant so determined.[7] On the strength of these promises, approximately $4.5 billion of Project 1, 2 and 3 bonds were purchased prior to the Initiative's passage. *See* PTO (CR 170) ¶¶ 87-89.

The Initiative cuts the contractual knot binding the Supply System and its lenders. The Supply System's covenants are now subject to a plebiscite, and it can issue additional bonds to complete construction *only* if the voters approve, irrespective of whether completion is required under the Bond Resolutions.

The primary question in the case, then, is whether the Supply System's bondholders, having lent more than $4,500,000,000 to a Washington municipal corporation, are entitled to the security that they bargained for. The district court found that they are, and the court of appeals agreed.[8] The State of Washington and several of its elected officials were parties in the courts below; they do not, however, seek to overturn the lower courts' decisions.

---

[7] The Project 1 and 2 Agreements provide for termination of the Project when:

> (b) The parties [Bonneville and the Supply System] determine the Project is not capable of producing energy consistent with Prudent Utility Practice or, if the parties disagree, the Project Consultant so determines .... (Project 1 and 2 Agree. § 15(b).) (Exs. 1,2).

Prudent Utility Practice requires that the Project be completed if completion can be

> expected to accomplish the desired result at the lowest reasonable cost consistent with reliability, safety and expedition. (Project 1 Agree., § 1(p) (Ex. 1); Project 2 Agree., § 1(k) (Ex. 2).

Provision for determination of disputes by the Consultant is found in Section 10. Similar provisions for Project 3, which has a private ownership component, are found in Sections 3, 4 and 7 of the Ownership Agreement (Ex. 4). Provision for terminating Project 3 when completion is not consistent with Prudent Utility Practice appears at Section 22(a) of the Ownership Agreement (Ex. 4).

[8] The Trustees also contended that the Initiative's voting scheme violated the Equal Protection Clause and the Supremacy Clause of the United States Constitution, as well as provisions of the Washington Constitution. Resting their decisions solely on the Contract Clause, neither the district court nor the court of appeals addressed these claims.

ARGUMENT

The Trustees move to affirm the judgment of the court of appeals that Initiative 394, as applied to Projects 1, 2 and 3, violates the Contract Clause of the United States Constitution (Art. I, § 10, cl. 1). Alternatively, the Trustees move to dismiss the appeal on the ground that appellant lacks standing to invoke this Court's appellate jurisdiction.

The district court and court of appeals carefully applied the principles of *United States Trust Company of New York v. New Jersey*, 431 U.S. 1 (1977), to this closely analogous case. Because this Court's recent decision in *Energy Reserves Group v. Kansas Power & Light Co.*, 51 U.S.L.W. 4106 (Jan. 24, 1983), demonstrates its continued adherence to the standards enunciated in *United States Trust Co.*, the questions raised by this appeal are so foreclosed by this Court's prior decisions as to leave no room for controversy.

A. THE DISTRICT COURT AND COURT OF APPEALS CORRECTLY DETERMINED THAT INITIATIVE 394 SUBSTANTIALLY IMPAIRS THE SUPPLY SYSTEM'S CONTRACTUAL OBLIGATIONS TO BONDHOLDERS.

Because it would permit the Supply System to terminate Projects 1, 2 and 3 in circumstances not contemplated by the Bond Resolutions, the district court and court of appeals found that Initiative 394 effects a "severe impairment that defeats the expectations of the parties under their contracts." J.S. App. 15a (citation omitted); J.S. App. 22a. The Supply System and Bonneville have determined that completion of the three projects is consistent with Prudent Utility Practice, and additional bonds must be issued for completion to occur. *See* Squire Aff. (CR 72), ¶¶ 5, 18; Gjelde Aff. (CR 164), ¶¶ 8, 18. Therefore, were it not for the Initiative, the Supply System would have the unconditional obligation to sell bonds to complete the projects. Under the Initiative, however, the Supply System must submit a proposed bond sale for the completion of the projects to voters, who may reject it even though completion is consistent with Prudent Utility Practice as determined under the contracts. The

Initiative, then, eliminates the contractual standard governing the Supply System's obligation to issue the bonds and complete the projects, and transforms that standard into a political question subject to the vagaries of a popular referendum.

In concluding that Initiative 394 thus impairs the bondholders' contracts, the court of appeals engaged in a straightforward application of *United States Trust Co., supra,* 431 U.S. 1. There, the Port Authority of New York and New Jersey had issued and sold revenue bonds to pay for transportation projects. Part of the bonds' security was a covenant that precluded the Authority from spending revenues on mass transit projects which were not self-supporting. After several million dollars of bonds had been sold, the covenant was repealed.

New Jersey argued that the covenant's repeal did not lessen the bonds' security. The bonds retained an "A" rating, and, although bond prices dropped after the repeal, they regained their position in the market. *Id.* at 19, 43. Furthermore, the trial court found that, since the enactment of the covenant, the bondholders' security had been "substantially augmented by a vast increase in Authority revenues and reserves" (*Id.* at 42), and that various other security provisions protected the bondholders even after the repeal. *Id.* at 44. Notwithstanding substantial uncertainty as to whether the bondholders' security had been diminished, this Court held that the bondholders' contractual rights had been impaired:

> The fact is that no one can be sure precisely how much financial loss the bondholders suffered. Factors unrelated to repeal may have influenced price. In addition, the market may not have reacted fully, even as yet, to the covenant's repeal, because of the pending litigation and the possibility that the repeal would be nullified by the courts.
>
> In any event, the question of valuation need not be resolved in the instant case because the State has made no effort to compensate the bondholders for any loss sustained by the repeal. As a security

> provision, the covenant was not superfluous; it limited the Port Authority's deficits and thus protected the general reserve fund from depletion. Nor was the covenant merely modified or replaced by an arguably comparable security provision. Its outright repeal totally eliminated an important security provision and thus impaired the obligation of the States' contract. (*Id.* at 19; footnote omitted; citations omitted.)

The bondholders in this case are also the victims of a "repeal." Initiative 394 abrogates the Supply System's authority and obligation to issue additional bonds to complete the projects when consistent with Prudent Utility Practice. Moreover, under the Initiative the projects can be terminated simply because the voters disapprove of their completion. By thus permitting an action previously proscribed by the contracts, the Initiative's very existence substantially impairs the protection provided by the covenants to complete, regardless of whether the electorate ultimately prevents the sale of additional bonds. *See, e.g., id.* at 20-21 (State law which "permits a diminution of . . . pledged revenues and reserves" impairs covenant prohibiting such diminution). Nothing in the Initiative compensates the bondholders for their loss of this "important security provision." *Id.* at 19.

By thus impairing the bondholders' security, the Initiative "defeats the expectations of the parties under their contracts." J.S. App. 15a (citation omitted). This distinguishes the cases relied upon by appellant, where state statutes eliminated unforeseen windfall benefits without affecting the reasonable expectations of the contracting parties. In *City of El Paso v. Simmons*, 379 U.S. 497 (1965), for example, the Court found that a statute which restricted contracting parties "to those gains reasonably to be expected from the contract" did not effect a substantial impairment. 379 U.S. at 515; *see United States Trust Co., supra*, 431 U.S. at 31 (discussing *Simmons*). Similarly, in *Energy Reserves Group v. Kansas Power & Light, supra*, federal natural gas deregulation would have resulted in

windfall gains to natural gas producers. The price limitations imposed by the Kansas legislature eliminated only a portion of the windfall, still leaving producers in a better position than their contracts had contemplated:

> If deregulation had not occurred, the contracts undoubtedly would have called for a much smaller price increase than that provided by the Kansas Act's adoption of the § 109 ceiling. (51 U.S.L.W. at 4110).

Because the challenged statute permitted an even greater price for natural gas than the contracts envisioned, the producers' expectations were not violated.

In this case, however, the Initiative does not eliminate a mere unforeseen windfall benefit. It instead abrogates the exact performance originally envisioned. The completion covenants were designed to assure bondholders that termination would not occur based solely on one contracting party's judgment of Prudent Utility Practice—or, for that matter, the decision of an electorate not bound by the contractual standards. Bondholders were entitled to expect that decisions regarding continuance of the projects would be made in conformity with the contracts. These covenants take on even greater importance when, as the Initiative evidences, the projects are politically unpopular. The court of appeals was thus clearly correct under the standards of *Energy Reserves Group* and *United States Trust Co.* in affirming the district court's finding that Initiative 394 thwarted the bondholders' expectations.

These expectations, engendered by the covenants to complete, were "not superfluous." *See United States Trust Co., supra,* 431 U.S. at 19. Indeed, the undertakings impaired by the Initiative were a "central aspect" of the Supply System's contracts. J.S. App. 11a.[9] The Bond Resolutions themselves represent that the operation of each project is "essential to the

[9] A representative of one of the Supply System's largest bondholders testified that the covenants to complete are "extremely important," and that his company would not have purchased Project 1, 2 or 3 bonds had the issuance of additional bonds been subject to voter approval. Bates Dep. (CR 132), p. 15.

payment and security of the Bonds." *See, e.g.*, Ex. 10, § 11.1 (Bond Res. 775 Project 3); J.S. App. 11a; n.11. Notwithstanding the existence of other security, "completion of the plants unquestionably will make more energy available to finance repayment." *Id.; see* O'Brien Dep. (CR 146), p. 154; Bates Dep. (CR 132), pp. 11-13; Sitzer Dep. (CR 188), p. 137.

Furthermore, the Supply System's promise to finance "the plants to completion, subject only to contractually specified conditions . . . was clearly an inducement to contract." J.S. App. 16a (citations omitted). Each Official Statement issued by the Supply System in connection with its bond sales disclosed the Supply System's covenant to "complete construction of [each] Project at the earliest practicable time," and noted that the revenue bonds were to be paid solely from the "income, revenues, receipts and profits derived by the Supply System through the ownership and operation by it of [each] Project." *See* Ex. 77 (Sept. 1, 1975, Official Statement for Project 1 Bonds, Series 1975), pp. 37, 11.

Under the principles of *United States Trust Co.*, nothing more is necessary to establish the Initiative's substantial impairment of contract. Going further than the bond trustee in that case, however, the Trustees here proved that the Initiative was a primary reason for a downgrade in the bond rating of Project 1, 2 and 3 bonds.[10] *Compare United States Trust Co., supra*, 431 U.S. at 19, 44, n.12. The Trustees also showed, and the district court found, that the secondary market for the bonds fell as a direct result of the Initiative's passage.[11] RP 224 (J.S. App. 22a); *compare United States Trust Co., supra*, 431 U.S. at 19, 43. The finding of substantial impairment is thus supported by substantial evidence and must be accepted for purposes of the appeal.

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[10] *See* Ex. 48, Ackerman Dep. (CR 133), pp. 45-46, 48 (discussing downgrade by Moody's Investor Service); Ex. 54A (discussing downgrade by Merrill, Lynch).

[11] *See* Ex. 36M, 360 (CR 148); Ex. 82; Scholes Dep. (CR 147), p. 71.

B. THE COURTS BELOW CORRECTLY DETERMINED THAT THE CONTRACTS DID NOT RESERVE TO THE STATE THE POWER TO ALTER THE SUPPLY SYSTEM'S OBLIGATIONS.

> The court of appeals held that the contracts could not reasonably be read as contemplating the kind of alteration of WPPSS's bonding authority effected by Initiative 394. (J.S. App. 10a.)

The trial court reached the same conclusion. *See* RP 100. In coming to this result, both courts below correctly applied principles established by this Court.

1. To Be Effective, a Contractual Reservation Must be Clear and Explicit.

Municipal bond contracts "have the same meaning as contracts between private persons." *Murray v. Charleston*, 96 U.S. 432, 445 (1878), *quoted with approval in United States Trust Co., supra*, 431 U.S. at 25, n.23. A promise in a bond contract accompanied by a reserved right to "change the effect of the promise, is an absurdity." *Id.* Accordingly, when a state claims a reserved right to alter its contractual obligations, the express reservation "must be clear and explicit." *Owensboro v. Cumberland Telephone & Telegraph*, 230 U.S. 58, 71-75 (1913). The court of appeals correctly recognized this standard, holding that "reservations are not to be lightly inferred." J.S. App. 12a (citations omitted).

Appellant's suggestion that the Supply System's obligations should instead be construed strictly against the bondholders, who have loaned $4.5 billion on the strength of the contracts, is devoid of merit. *See* J.S. 15-16. This Court has construed contracts in favor of the State only where the contract evidences a grant by the sovereign. *See, e.g., Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420, 544 (1837) (franchise); *Northwestern Fertilizing Co. v. Hyde Park*, 97 U.S. 659, 666 (1878) (corporate charter). The Bond Resolutions, however, grant no privilege to the bondholders. On the contrary, they provide for repayment of and security for the bondholders' loans. In these circumstances, strict construction

of the Supply System's obligations against its creditors would be both unprecedented and unjust.[12]

2. RCW 43.52.3411 Does Not Reserve to the State the Power to Amend the Bondholders' Contracts.

RCW 43.52.3411 authorizes a joint operating agency to issue revenue bonds "by resolution" whenever it "shall deem it advisable." J.S. App. 33a-34a. The form, content and legal effect of bonds so issued, as well as the procedures for their issuance, are governed by "the provisions of law as now or hereafter in effect relating to revenue bonds of public utility districts." *Id.* at 34a. The court of appeals concluded that this incorporation by reference of statutes relating to Washington public utility districts ("PUDs") did not constitute "a reservation of state authority to make the changes imposed by Initiative 394." J.S. App. 12a-13a.[13]

A study of predecessor statutes to RCW 43.52.3411 establishes that the court of appeals correctly identified its purpose.[14] In 1955, Washington enacted detailed legislation governing the

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[12] *Keefe v. Clark*, 322 U.S. 393 (1944), does not bear upon this issue. This Court there held only that it would not interpret a state statute to create a contractual obligation absent evidence of the legislature's clear intent to do so. 322 U.S. at 396-7. Here, no one questions the existence of the contractual obligations. *See* J.S. 12, n.12; PTO (CR 170) ¶¶ 61-63.

[13] Appellant has also claimed that Section 5(a) of the Project Agreements reserves the State's right to curtail the Supply System's authority to issue additional bonds. Even if that is the case, the reservation is ineffective against bondholders, who were not party to the Project Agreements. Indeed, appellant makes no claim that the alleged reservation in Section 5(a) of the Project Agreements affects the bondholders' rights. *See* J.S. 13 (Section 5(a) "constitutes a clear warning to BPA . . .").

[14] Appellant implausibly argues that the purported reservation in RCW 43.52.3411 was enacted because of the abolition of the Washington State Power Commission. J.S. 14, n.14. The only authority ever exercised by that Commission over joint operating agencies was its power to approve their construction of power projects. 1953 Wash. Laws Ch. 281, § 16. The Commission had no control over the issuance of bonds to complete the projects. *Id.* at § 15. Moreover, the legislature repealed the Commission's approval authority two years before enacting RCW 43.52.3411, suggesting the absence of a causal relationship between the two actions. 1955 Wash. Laws Ch. 258, § 17; 1957 Wash. Laws Ch. 295, § 6.

form, content and legal effect of joint operating agency bonds. These provisions were virtually identical to statutes controlling revenue bonds issued by public utility districts. *Compare* 1955 Wash. Laws Ch. 258, §§ 6-16 (governing joint operating agency bonds) *to* 1941 Wash. Laws Ch. 182, §§ 1-11 (governing PUD bonds, codified at RCW 54.24.020-120). To avoid unnecessary repetition, the legislature in 1957 repealed the duplicative statutes relating to joint operating agency bonds (with the exception of RCW 43.52.343, which differed slightly from RCW 54.24.060, the comparable PUD provision), replacing them with what is now RCW 43.52.3411. 1957 Wash. Laws Ch. 295, §§ 6, 7, 9. Thus, the language of RCW 54.24.030-050 and RCW 54.24.070-120, which had previously been set out in full, was incorporated into Chapter 43.52 by reference.

Viewed in this context, RCW 43.52.3411 is plainly a "reference" statute, designed solely "to avoid encumbering the statute books by unnecessary repetition . . ." *Knowles v. Holly*, 82 Wash.2d 694, 700, 513 P.2d 18 (1973). The phrase "as now or hereafter in effect" merely assures that Supply System and PUD bonds will continue to be equivalent in form and effect, notwithstanding future amendments to PUD bond statutes.[15] The purpose of RCW 43.52.3411 is thus simply to save space in the statute books, not to avoid the Contract Clause.

Furthermore, the very provision alleged to constitute an express reservation assumes that the Supply System has, and will continue to have, authority to issue bonds. That authority is expressed in the first two sentences of RCW 43.52.3411, which give the Supply System power to issue bonds "by resolution," whenever it deems issuance advisable. This aspect of Supply System authority is neither modified nor governed by

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[15] This equivalence also demonstrates that RCW 43.52.3411 reserves nothing to the State. The language that purportedly constitutes an "express reservation" does not appear in the statutes relating to PUD bonds. Construing RCW 43.52.3411 as reserving to the State the power to alter the Supply System's contractual obligations to bondholders would therefore violate the clear legislative intent to place the bonds of PUD's and joint operating agencies on an equal footing.

the "provisions of law as now or hereafter in effect relating to revenue bonds . . . of public utility districts." Consequently, the PUD bond statutes apply to "revenue bonds . . . *issued* by the joint operating agency." RCW 43.52.3411 (emphasis supplied).

The court of appeals thus correctly concluded that "the effect of Section 3411 simply is to render applicable to future bond issues the requirements of state law then in existence so long as" imposition of new requirements does not offend the Contract Clause. J.S. App. 13a.[16] This construction of a Washington state statute by the lower courts should be accepted on appeal. *See Huddleston v. Dwyer,* 322 U.S. 232, 237 (1944) (Court ordinarily accepts a "considered determination of questions of state law by the intermediate federal appellate courts").

C. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE CONTRACTS DO NOT COMPEL THE STATE TO SURRENDER ESSENTIAL ATTRIBUTES OF SOVEREIGNTY.

This Court has frequently recognized the power of a municipality to covenant to exercise authority granted to it by the State, and has also held that the Contract Clause prohibits a state from impairing such promises. Thus, where a state authorizes a municipality to tax, and the municipality has promised, as security to creditors, to levy certain taxes, the Contract Clause precludes the State from withdrawing the power to tax until the obligation is satisfied. *Louisiana ex rel. Hubert v. New Orleans,* 215 U.S. 170 (1909); *Wolff v. New Orleans,* 103 U.S. 358 (1881); *Von Hoffman v. City of Quincy,* 71 U.S. (4 Wall.) 535 (1867); *see also United States Trust Co.,*

[16] Even if this conclusion were incorrect, summary affirmance or dismissal would remain appropriate. Because the reservation, if any exists, appears only in the Supply System's enabling statutes, it would preclude only the Supply System itself from complaining about a legislative change. It would not permit impairment of the Supply System's contractual obligations to third parties, such as bondholders. *Coombes v. Getz,* 285 U.S. 434, 440-42 (1932).

supra, 431 U.S. at 24, n.22. These cases rest upon the sound principle that "security" offered by a municipal corporation cannot be withdrawn. *Louisiana v. Pilsbury*, 105 U.S. 278, 288 (1882).

Washington has authorized the Supply System to construct generating facilities, issue bonds and make covenants "to protect and safeguard the security . . . of the holders thereof." RCW 43.52.300(2); RCW 43.52.3411; RCW 54.24.050. As security to the purchasers of billions of dollars of its bonds, the Supply System promised to complete its projects and to issue additional bonds as necessary for that purpose. It had the statutory authority to make these promises, and they therefore were not invalid *ab initio*. *See County of Moultrie v. Rockingham Ten-Cent Savings Bank*, 92 U.S. 631, 632-33 (1876); *see also United States Trust Co., supra*, 431 U.S. at 25 (revenue bond could be secured by "promise to continue operating the facility in question").

The Initiative now conditions performance of the covenants on the results of a vote. That this is a fundamental alteration of the Supply System's substantive obligation to bondholders, rather than a mere change in its governance, is illustrated by *Shapleigh v. City of San Angelo*, 167 U.S. 646 (1897). In *Shapleigh*, a court invalidated the City's incorporation after it had issued bonds. It then reincorporated. When bondholders sought to recover on the bonds, the new City relied upon a Texas statute, enacted after the bonds' issuance, which exempted a reincorporated municipality from liability on its predecessor's obligations unless they were assumed by a vote. This Court found that, if applicable to the facts before it, the statute would impair the bondholders' contract:

> If the law . . . was that, by a voluntary reincorporation and a taking over of property rights of the old corporation, the existing obligations devolved upon the new corporation, *it would plainly not be a legitimate exercise of legislative power, as affecting such prior obligations, to substitute an obligation contingent upon the vote of the taxpayers.* (167 U.S. at 657; emphasis supplied.)

The statute in *Shapleigh* thus impaired the City's obligation in the same way that Initiative 394 impairs the Supply System's obligation: the Initiative "substitute[s] an obligation contingent upon a vote" for the Supply System's contractual duty to complete the projects.

The Initiative's substantive effect is also illustrated by its abrogation of contractual standards. The Resolutions require completion unless the Supply System and Bonneville, or, if they disagree, an independent arbiter, determine that completion is inconsistent with Prudent Utility Practice.[17] But Initiative 394 does not, and could not, require voters to follow the Prudent Utility Practice standard:

> Initiative 394 adds a new and unpredictable element. . . . No standard can be imposed on the electorate in exercising its decision, nor can it be subjected to any review. It can reject the proposal [for additional bonds] for any reason or no reason. The addition of the referendum requirement is, we conclude, a severe impairment that defeats the expectations of the parties under their contracts. *See Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234 (1978). (J.S. App. 15a.)

Finally, even if Washington's power of "governance" permits it to substitute a referendum for the Supply System's contractually guided decisions, its exercise does not excuse the Initiative's elimination of Bonneville from the decision making process. Bonneville's participation in Prudent Utility Practice decisions assures the bondholders that the projects cannot be

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[17] Appellant argues that Prudent Utility Practice is a meaningless standard. However, it is a recognized term in the industry (Akridge Dep. (CR 149), pp. 49-52), has been applied on other projects (Titmuss Dep. (CR 165), pp. 191-93), and has been applied by Bonneville to Projects 1, 2 and 3 (Hoberg Dep. (CR 144), pp. 34-35; Sienkiewicz Dep.(CR 142), p. 74). Moreover, as the court of appeals aptly noted,

> We need not attempt to define its contours. It is sufficient to note that it is the standard to which the parties agreed. (J.S. App. 4a, n.4)

terminated by unilateral action. Exs. 1, 2 (Project 1 and 2 Agree.), § 15(b); Ex. 4 (Project 3 Ownership Agree.), §§ 3, 4, 7. Initiative 394, however, permits voters residing within the governmental entities comprising the Supply System to decide that the projects will not be funded, without seeking Bonneville's consent. This elimination of multiparty participation in the most important decision relating to the projects is more than a simple change in the Supply System's governance.

D. THE DISTRICT COURT AND COURT OF APPEALS CORRECTLY DETERMINED THAT THE STATE COULD NOT JUSTIFY THE INITIATIVE.

Once a state law is shown to effect a substantial impairment, "the State, in justification, must have a significant and legitimate public purpose behind the regulation, *United States Trust Co.*, 431 U.S. at 22 . . ." *Energy Reserves Group, supra*, 51 U.S.L.W. at 4109. That justification will be sufficient only if the challenged legislation's

> adjustment of "the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption." *United States Trust Co.*, 431 U.S., at 22. (*Id.*, 51 U.S.L.W. at 4109.)

The legislation must also be "necessary to serve an important public purpose." *United States Trust Co., supra*, 431 U.S. at 25. Applying precisely this standard, both the district court and the court of appeals correctly found that the Initiative was not justified.

1. The Court of Appeals Accorded the Appropriate Degree of Deference to the State's Legislative Judgment.

In reviewing the justification for the Initiative, the court of appeals noted that:

> Our determination whether the State's action is justified is affected by the fact that WPPSS is itself a political

> subdivision of the State, made up of other political subdivisions. . . . Because the State is a contracting party, we give less deference to its claims of justification for impairment. [*United States Trust Co.*] at 25-26. (J.S. App. 16a.)

This standard properly governed the court of appeals' inquiry. It is irrelevant that the State of Washington does not itself appear as a party to the contracts: in exercising its statutory authority, the Supply System, and its member municipal corporations, acted as "mere instrumentalities of the State."[18] *Meriwether v. Garrett,* 102 U.S. 472, 511 (1880); *see* J.S. 17, n.17. As this Court recently noted, it has "[i]n almost every case . . . held a *governmental unit* to its contractual obligations when it enters financial or other markets." *Energy Reserves Group, supra,* 51 U.S.L.W. at 4109, n.14 (citations omitted; emphasis supplied), *citing W. B. Worthen Co. v. Kavanaugh,* 295 U.S. 56 (1935) (State statute held to unconstitutionally impair obligations of a municipal corporation's bonds), *and* Note, "A Process-Oriented Approach to the Contract Clause," 89 Yale L.J. 1623, 1647-48 (1980) (distinguishing "public" from "private" contracts).

Strict scrutiny of legislation that impairs municipal contracts is necessary because "the State's self-interest is at stake." *United States Trust Co., supra,* 431 U.S. at 26. That rationale applies with particular force to the Supply System's obligations. The same voters ultimately responsible for selecting the Supply

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[18] In this sense, the Supply System must be distinguished from Kansas Power and Light, the utility whose contracts were impaired in *Energy Reserves Group, supra.* Although regulated by the Kansas Corporation Commission, KPL is not a governmental subdivision of a State, as is the Supply System. *See* 51 U.S.L.W. at 4109, n.14. Accordingly, the law affecting KPL's obligations did not implicate the State's self-interest. Here, on the other hand, Washington's electorate freed a governmental subdivision, which is composed of other governmental subdivisions, from its obligations to bondholders.

System's governing bodies participated in the passage of Initiative 394.[19] Furthermore, because the cost of Projects 1, 2 and 3 is recovered by Bonneville from all of its customers (Gjelde Aff. (CR 164), ¶ 6), nearly all Washington voters are economically affected by the projects. *See* PTO (CR 170)¶¶ 12-13 (describing Bonneville service area). Their self-interest was at stake in voting on the Initiative. Strict scrutiny is therefore imperative.

2. Permitting a Vote on Public Contractual Obligations Is Not a Legitimate Public Goal for Purposes of the Contract Clause.

Initiative 394's stated purpose is "to provide a mechanism for citizen review and approval of proposed financing for major public energy projects," including Projects 1, 2 and 3. Initiative, § 2 (J.S. App. 26a). Appellant thus suggests that the Initiative's primary public purpose is to provide a "citizens' vote" and that "[t]here is no less drastic means of accomplishing the goal of a citizens' vote than having a citizens' vote . . . ." J.S. 26.

Aside from the tautological nature of this argument, a citizens' vote is not a legitimate public goal for purposes of Contract Clause analysis. If it were, a State could avoid its contractual commitments at any time, without running afoul of the Contract Clause, simply by passing legislation calling for a referendum on whether to perform its obligations. Such a maneuver cannot be countenanced. The electorate had its say when it elected the representatives responsible for promulgating the Supply System's Bond Resolutions. It cannot be a legitimate public purpose to now permit it to decide whether the

[19] The Supply System is composed of 23 Washington municipal corporations, all governed by elected representatives. *See* RCW 54.12.010; 54.40.070 (providing for elections of PUD commissioners); RCW 35.17.020; 35.18.020; 35A.12.040; 35A.13.020 (providing for elections in towns and cities). Its Board of Directors is, in turn, chosen by "[t]he legislative body of each member" of the Supply System. RCW 43.52.370(1). The Supply System's Executive Board, created in 1981, is selected partially by the Board of Directors and partially by the Governor. RCW 43.52.374.

commitments contained in those Resolutions should be honored. *See Energy Reserves Group, supra,* 51 U.S.L.W. at 4109, n.14 ("When a State itself enters into a contract, it cannot simply walk away from its financial obligations.").

3. The District Court and Court of Appeals Correctly Concluded that the Initiative Is Not Reasonable in Light of Changed Circumstances.

State legislation cannot legitimately impair contractual rights in order to address problems existing at the time the contracts were entered into. *United States Trust Co., supra,* 431 U.S. at 31-32. To justify an impairment, there must be new circumstances that are not simply "changes . . . of degree . . . ." *Id.* at 32. Initiative 394 fails to surmount this hurdle, for the "concerns addressed by the Initiative were not unknown in the early 1970's." J.S. App. 20a.

The record amply supports this conclusion. Cost overruns had been recognized as concerns on nuclear projects by the 1970's. Sitzer Dep. (CR 188), pp. 152-53; *see also* Exs. 68 at 26, 69 at 1-3 (1967 and 1974 Reports of Atomic Energy Commission). Such problems have historically plagued large construction projects. Bates Dep. (CR 132), p. 49. The Supply System consequently addressed cost overrun and cost effectiveness concerns in the Prudent Utility Practice standard governing its actions on the projects. *See, e.g.,* Ex. 1 (Project 1 Agreement), § 1(p). As was true of the legislation considered in *United States Trust Co.,* then, the Initiative does not respond to concerns unknown at the time the contracts were executed.[20]

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[20] Furthermore, the Supply System's problems were largely ameliorated by the time of the Initiative's passage. The report of the Washington Senate Energy and Utilities Committee (Ex. 26), dated January 12, 1981, noted that the Supply System had appointed a new managing director in August of 1980, who had pledged to adopt a more rigorous approach to the Supply System's management. The Committee felt "encouraged" by his actions (Ex. 26, p. 4), and analysts subsequently agreed that the new director's policies largely resolved the Supply System's management problems. Hoberg Dep. (CR 144), pp. 42, 86; Titmuss Dep. (CR 165), p. 181. Indeed, in the ten months preceding April 1982, Projects 1, 2 and 3 proceeded approximately on schedule and close to the Supply System's budget. *See* Ex. 1 to Aff. of Alexander Squire (CR 156).

The Initiative is also unreasonable because it is not "tailored to the problems it was" purportedly enacted to solve. *See* J.S. 25, n.22. The Initiative states that it is intended to address concerns relating to the allocation of "limited financial resources." Initiative, § 2 (J.S. App. 26a). This purpose allegedly embraces the dual goals of requiring the Supply System to consider cost effectiveness criteria in making its decisions and forcing it to live within stated budgets. J.S. 27.

In providing for a public vote, however, the Initiative does not demand that the Supply System or the electorate consider the results of cost effectiveness studies. In fact, the only requirement for examination of cost effectiveness appears in the very contracts impaired by the Initiative, which mandate that decisions be made in conformity with Prudent Utility Practice. Nor does the Initiative require the Supply System to live within its budgets. It merely provides for a new citizens' vote whenever the Supply System wishes to exceed the spending authority established by any previous referendum approving the issuance of bonds.

4. The District Court and Court of Appeals Correctly Concluded That the Initiative Was Not Necessary to Serve Any Legitimate Public Purpose.

An enactment impairing contractual obligations can be justified only if it is "necessary" to serve an important public purpose. *United States Trust Co., supra,* 431 U.S. at 29. Accordingly, "a State is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well." *Id.* at 31. In this case, more moderate action than the Initiative could have remedied whatever problems confronted the Supply System.

For example, although the Senate Energy and Utilities Committee's Report is the basis for appellant's recitation of the Supply System's difficulties (*see* J.S. 23; *see also* Zemke Aff. (CR 159)), that Committee never recommended any measure similar to Initiative 394. Instead, it suggested ten steps to improve and oversee the Supply System's management. Ex. 27

at pp. 3-6. The State Legislature responded by enacting laws providing for better oversight and management of the Supply System. 1981 Wash. Laws (1st Ex. Sess.) Ch. 3, § 2; 1982 Wash. Laws (1st Ex. Sess.) Ch. 43, § 3. On the other hand, the Legislature in 1981 rejected bills calling for elections on Supply System bonds in certain circumstances (*See* Ex. 73), and Washington's Governor declared that Initiative 394 was "unnecessary." Ex. 72. The district court appropriately noted these rejections of the Initiative's solutions. RP 116. They leave little doubt that the Initiative was unnecessary, a conclusion reinforced by closer examination of its purported justifications.[21]

The Initiative was not necessary to assure public accountability. As the court of appeals noted, "[t]hrough the election process, the voters have always had direct or indirect control of" the Supply System (J.S. App. 17a), a fact admitted by the State. *See* State Defendants' Answer to Plaintiffs' Interrogatory No. 7 (Ex. 74). Furthermore, "[a]t least one alternative method of achieving public accountability has actually been adopted." J.S. App. 17a (citation omitted). That this alternative was enacted later is of no consequence, for it was available to the State at the time of the Initiative's passage.

Nor is the voter approval requirement necessary to assure consideration of cost effectiveness criteria:

> Cost effectiveness studies can be required without being tied to an election requirement for the issuance of bonds. . . . (J.S. App. 17a).[22]

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[21] In an effort to bootstrap its way past this Court's "necessity" requirement, appellant has defined the Initiative's purpose as the precise change which it accomplishes, arguing that there is no less drastic means of attaining that goal. Were this the appropriate mode of analysis, of course, every state enactment would be "necessary." It was clearly not this Court's intention, however, to create a meaningless standard. Moreover, requiring a vote on preexisting public obligations is not a legitimate public purpose. *See* Part D(2), *supra*.

[22] The Supply System recently agreed to submit to cost-effectiveness studies, in which the public will have the opportunity to participate, without a referendum on the issuance of additional bonds. *See* Addendum to Motion of Continental Illinois National Bank and Trust Company of Chicago to Dismiss or Affirm.

In fact, the Initiative does not require either the Supply System or the electorate to consider cost effectiveness. Instead, it gives the electorate the power, unburdened by any standard, to terminate funding of projects, a capability manifestly unrelated to cost effectiveness considerations.

Similarly, voters need not have the power to deny the Supply System authority to issue additional bonds in order to force adherence to budgets. The argument that the Initiative is necessary to serve this purpose hypothesizes that voters will approve issuance of additional bonds, thereby establishing a "debt limit." *See* J.S. 27-28. The Initiative, however, permits a complete rejection of funding authority for Projects 1, 2 and 3, a more drastic alternative than necessary to enforce budgets.

E. THE COURT OF APPEALS PROPERLY DECIDED THIS CASE WITHOUT REMANDING FOR FURTHER FINDINGS.

The district court's findings satisfy Fed. R. Civ. P. 52. The trial court adopted as findings 105 paragraphs of stipulated fact contained in the Amended Pretrial Order. RP 223. Directing its attention to the issues of disputed fact identified by the parties, the district court specifically found that the Initiative impaired the bondholders' contractual rights, reduced the security for their bonds, created uncertainty as to the Supply System's ability to finance completion of Projects 1, 2 and 3, and reduced the value of the bonds on the secondary market. RP 224 (J.S. App. 21a-22a). Accordingly, the district court concluded that the Initiative effected a "substantial impairment." RP 225 (J.S. App. 22a). Finally, the trial court stated that it could not "find that 394 is reasonable and necessary under the guidelines . . . set forth in the *United States Trust* case." RP 226 (J.S. App. 23a). In light of the nature of the

case, largely involving the construction of contracts and statutes, more extensive findings were unnecessary. [23]

Moreover, "it is settled that findings are not jurisdictional and the appellate court may decide the appeal without further findings if it feels that it is in a position to do so." C. Wright & A. Miller, *Federal Practice and Procedure*, § 2577, pp. 699-700 (1971). The court of appeals considered the findings sufficient to enable it to review the district court's decision. Because the results of its review were manifestly correct, it would be pointless to consume valuable judicial resources by remanding for further findings.

F. APPELLANT LACKS STANDING TO INVOKE THIS COURT'S APPELLATE JURISDICTION.

Appellant is a self-appointed "citizens' group that drafted and campaigned for" Initiative 394. J.S. 3. Its participation in the political process leading to the adoption of the Initiative, however, does not give it the direct personal stake in the outcome of this litigation that would permit it to invoke this Court's appellate jurisdiction. *See* Motion of Appellee Continental Illinois National Bank and Trust Company of Chicago to Dismiss or Affirm.

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[23] Neither the district court nor the court of appeals entered findings as to the meaning of Prudent Utility Practice. *See* J.S. 29. Such findings were unnecessary because Prudent Utility Practice, a contractually defined term, "is the standard to which the parties agreed." J.S. App. 4a, n.4. Furthermore, at the time the district court entered its findings, counsel for the State of Washington, referring to counsel for the appellant in this Court, twice advised the court that the findings were sufficiently specific for purposes of appeal. RP 226-228. No party requested written findings or moved for additional findings.

CONCLUSION

For the reasons stated above, this Court should dismiss the appeal or, in the alternative, summarily affirm the decision of the court of appeals.

Respectfully submitted,

WILLIAM R. SQUIRES, III
4200 Seattle-First National
Bank Building
Seattle, Washington 98154
(206) 622-3150

Counsel for Seattle-First National Bank and Morgan Guaranty Trust Company of New York, Appellees.

STEPHEN M. RUMMAGE
DAVIS, WRIGHT, TODD,
RIESE & JONES

Of Counsel

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No. 82-1445

In the Supreme Court of the United States

OCTOBER TERM, 1982

THE DON'T BANKRUPT WASHINGTON COMMITTEE,
APPELLANT

v.

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, SEATTLE-FIRST NATIONAL BANK AND MORGAN GUARANTY TRUST COMPANY OF NEW YORK, AND THE UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION OF APPELLEE THE UNITED STATES OF AMERICA TO DISMISS OR AFFIRM

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether Washington State Initiative 394, which requires a public referendum on power plant financing that the Washington Public Power Supply System has already contracted to provide, impairs the obligation of contracts in violation of Article I, Section 10, Clause 1 of the Constitution.

2. Whether appellant, a citizens' group which played a role in passage of Initiative 394, has standing to appeal when the State and its elected officials have decided to terminate the litigation.

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In the Supreme Court of the United States

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THE DON'T BANKRUPT WASHINGTON COMMITTEE, APPELLANT

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CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, SEATTLE-FIRST NATIONAL BANK AND MORGAN GUARANTY TRUST COMPANY OF NEW YORK, AND THE UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION OF APPELLEE THE UNITED STATES OF AMERICA TO DISMISS OR AFFIRM

Pursuant to Rule 16.1 of the Rules of this Court, the United States of America moves that the appeal in this case be dismissed, or alternatively, that the judgment of the Court of Appeals for the Ninth Circuit be affirmed.

OPINIONS BELOW

The opinion of the court of appeals (J.S. App. 1a-20a) is reported at 696 F.2d 692. The opinion of the district court (partially reproduced at J.S. App. 21a-23a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 11, 1983 (J.S. App. 1a). The notice of appeal was filed on January 20, 1983 (J.S. App. 24a-25a). The jurisdictional statement was filed on February 25, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(2). As we argue below, pages 22-27, appellant lacks standing to invoke this Court's appellate jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Contract Clause of the United States Constitution, Article I, Section 10, Clause 1, and Washington State Initiative Measure No. 394, 1981 Wash. Laws (2d Ex. Sess.) ch. 6, are set forth at J.S. 2 and J.S. App. 26a-32a.

STATEMENT

Appellant, a citizens' group in the State of Washington, seeks review of the Ninth Circuit's decision that the Washington Public Power Supply System ("WPPSS") is bound by its contracts with the Bonneville Power Administration ("BPA") and others to finance and construct three nuclear power plants. The court of appeals held that Washington State Initiative Measure No. 394—which requires referendum approval of bond issues needed to complete the construction—is unconstitutional insofar as it impairs WPPSS's obligations under those contracts.

1. BPA is a federal agency charged with marketing electric power produced in the Columbia River Basin to customers in the Pacific Northwest.[1] In the early 1970's, faced with rapidly increasing demand

[1] 16 U.S.C. 832, 838; 16 U.S.C. (Supp. V) 839 *et seq.*; 42 U.S.C. (Supp. IV) 7152(a)(1)(D).

for electric power, it embarked upon a program under which some of its customers agreed to build additional power plants to meet the anticipated demand (J.S. App. 2a-3a).[2] WPPSS is a joint operating agency of the State of Washington, comprising 19 public utility districts and four municipalities. In 1971 and 1973 WPPSS contracted with BPA to build three nuclear power plants as part of the BPA program (J.S. App. 3a).[3]

The contracts ("Project Agreements")[4] obligated WPPSS to "construct the Project[s] in accordance with Prudent Utility Practice" (E.R. 199). If WPPSS and BPA disagree about whether this standard directs a halt to construction, the contracts require the issue to be resolved by a neutral project consultant (J.S. App. 4a). Neither WPPSS nor BPA has de-

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[2] Congress approved BPA's decision to arrange for additional power in this fashion in the Public Works Appropriation Acts of 1970 and 1971, Pub. L. No. 91-144, 83 Stat. 333; Pub. L. No. 91-439, 84 Stat. 899. Congress also defined these projects as part of BPA's federal base system resources under the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. (Supp. V) 839 *et seq.*, to be used to meet BPA's statutory and contractual obligations to supply power. See 16 U.S.C. (Supp. V) 839a(10), 839d.

[3] Wash. Rev. Code Ann. § 43.52.360 (Supp. 1981) provides in pertinent part that two or more cities or public utility districts may form a "joint operating agency" for the purpose of "constructing, operating and owning plants * * * for the generation * * * of electric energy and power." See also *Id.* § 43.52.300(3).

[4] E.R. 192-216. References are to the contract governing Project No. 1. The contracts governing the other two projects are similar.

"E.R." refers to the Excerpts of Record filed in the court of appeals.

termined that the plants cannot be completed in accordance with prudent utility practice (E.R. 1370). WPPSS also contracted to finance the construction through issuance of revenue bonds, payable from the income derived from operation of the power plants (J.S. App. 4a).[5] The Project Agreements are thus one category of contracts that the State impaired when it passed a law forbidding WPPSS to finance construction unless it had the voters' approval via a referendum.

In resolutions accompanying the bonds that have been issued ("bond resolutions") WPPSS covenanted with the bondholders that it would "proceed with all reasonable diligence to * * * complete * * * construction at the earliest practical time" (E.R. 978).[6] It also promised to issue additional bonds "to the extent required to enable the System to pay the remaining balance of the Cost of Construction" (*id.* at 937). The resolutions recognize that performance of the covenant to complete and operate the projects is "essential to the payment and security of the Bonds" (*id.* at 994). The bond resolutions are thus a second category of contracts that the State impaired when it passed Initiative 394. Since the bonds involved are revenue bonds, failure to complete the projects would jeopardize the stream of revenues that the bondholders counted on to secure their investment.

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[5] When it entered the Project Agreements WPPSS's board of directors was statutorily authorized to issue revenue bonds to finance the construction of energy projects "[w]henever the board * * * shall deem it advisable" to do so. Wash. Rev. Code Ann. § 43.52.3411 (1970).

[6] Under Washington law, the bond resolutions are contracts between WPPSS and the bondholders. Wash. Rev. Code Ann. § 54.24.110 (1962).

WPPSS and the other project "participants"[7] assigned their shares of the plants' future output to BPA. BPA in turn assumed their obligation to pay the principal and interest on the revenue bonds (and other costs) whether or not the projects are completed (J.S. App. 4a-5a).[8] These agreements ("Net Billing Agreements"), like the Project Agreements, require WPPSS to construct the plants unless "Prudent Utility Practice" should direct otherwise (J.S. App. 4a). The Net Billing Agreements are the third category of contracts impaired by Initiative 394.

Construction began at the three plants in 1972, 1975, and 1977 (E.R. 101, 103, 105), and by mid-1982 the three projects were approximately 89%, 63%, and 52% complete (E.R. 102, 103, 105). At that time, approximately $6.1 billion in revenue bonds had been issued to finance construction, and it was estimated that $2.8 billion more would be necessary to complete the three projects (E.R. 112-114).[9] Two

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[7] WPPSS sold part of each project's generating capability to other "preference customers" of BPA (i.e., public bodies and cooperatives, who are entitled to priority in BPA's sales of electricity). These project "participants" then assumed liability for an equivalent percentage of the project cost. For example, the City of Seattle got 7.992% of the capacity of Project 2, and undertook to pay 7.992% of its cost (Exh. 6). "Exh." refers to exhibits introduced in the district court.

[8] BPA is entitled to 100% of the output of two plants, and 70% of the third (J.S. App. 5a n.5). The sum of the yearly payments Bonneville would have to make on the outstanding bonds through the year 2018 is approximately $20 billion (Exh. 28).

[9] The court of appeals stated that in May 1981 the estimated total cost of the three plants was $12 billion (J.S. App. 6a n.8). The additional $3.1 billion is attributable to interest paid, or to be paid, during construction by BPA under the

of the projects are scheduled to be completed in 1984 and 1986 (E.R. 102, 105). There have been significant cost overruns and delays in the construction of the plants,[10] but as we noted above, none of the parties has sought termination of the projects under the contractual standard ("Prudent Utility Practice").

2. Initiative 394 was passed in November, 1981. It applies to future "[m]ajor public energy project[s]," including those under construction if costs have exceeded the original estimates by more than 200% (J.S. App. 26a-27a). The Initiative provides that "[n]o public agency [of the State of Washington] * * * may issue or sell bonds to finance the cost of construction * * * of a major public energy project, or any portion thereof, unless it has first obtained authority * * * at an election conducted in the manner provided in this chapter" (J.S. App. 28a). The Initiative requires voter approval "[b]ecause the construction of major public energy projects will significantly increase utility rates for all citizens" (J.S. App. 26a). Since the statute applies only to "[m]ajor public energy project[s]"—i.e., plants capable of generating more than 250 megawatts (*id.* at 26a-27a)—it affects only the three nuclear power plants at issue in this lawsuit (plus two other nuclear plants not involving BPA).

Net Billing Agreements, and to the cost attributable to investor-owned utilities' 30% ownership share of Project 3 (E.R. 875-876). See note 8, *supra*. The parties to the contracts have agreed to delay further construction of one of the plants—Project 1 (E.R. 1514).

[10] This has been true for most nuclear plants, which have faced five-fold increases from 1967 to 1974 primarily because of inflation and regulatory requirements (Exh. 69, at 1-3; see also Exh. 83, at 1-4).

3. The trustees for the holders of bonds already issued by WPPSS,[11] and the United States of America on behalf of BPA, brought these consolidated actions against the State of Washington challenging the validity of Initiative 394. They argued that the voter approval requirement for issuance of the bonds necessary to finish the plants impaired the obligation of WPPSS's contracts with the bondholders (the bond resolutions) and BPA (the Project Agreements and the Net Billing Agreements). The United States also argued that in any event federal law—including the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. (Supp. V) 839 *et seq.*—preempted the Washington Initiative. The Don't Bankrupt Washington Committee, which had sponsored Initiative 394 on the 1981 ballot, intervened in support of the State.

The facts were largely stipulated by the parties (E.R. 90-117) and the relevant contracts were submitted to the district court. The district court held that Initiative 394 unconstitutionally impaired WPPSS's existing contractual obligations to finance and complete the three partially-constructed nuclear power plants (E.R. 159-180; J.S. App. 21a-23a).

4. The Ninth Circuit affirmed (J.S. App. 1a-20a). Applying settled law enunciated by this Court in *United States Trust Co.* v. *New Jersey*, 431 U.S. 1 (1977), and *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1978), the court of appeals held that WPPSS had contracted, without material reservation, to use its best efforts to finance and construct the three plants (J.S. App. 10a-14a). It also found that Initiative 394, by requiring voter approval of the fi-

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[11] Continental Illinois National Bank and Trust Company of Chicago, Morgan Guaranty Trust Company of New York, and Seattle-First National Bank.

nancing needed to complete the plants, substantially impaired the obligation of these contracts (J.S. App. 14a-16a). It held that this impairment was not justified as a reasonable or necessary exercise of the State's financial or economic powers (J.S. App. 16a-20a).

ARGUMENT

I. APPELLANT'S ARGUMENTS AGAINST APPLICATION OF THE CONTRACT CLAUSE ARE WITHOUT MERIT

Settled Contract Clause principles reaffirmed by this Court in *United States Trust Co.* v. *New Jersey*, *supra*, and in *Allied Structural Steel Co.* v. *Spannaus*, *supra*, make clear that Initiative 394 worked an impairment of contract that was both substantial and unjustified. As the court of appeals noted, "the promise of completion was the only consideration BPA received for agreeing to pay the construction and financing costs" of the three power plants (J.S. App. 11a). Similarly, investors in the revenue bonds expected, if nothing else, that WPPSS would complete the projects whose revenues were to be the return on their investment. There is little justification for claiming either a reserved right to renege on those promises, or a public purpose to excuse their performance.

A. WPPSS Has No Expressly Reserved Right To Walk Away From Its Contracts

Appellant first argues that no impairment of contract occurred because the State and WPPSS expressly reserved the right " 'to change their minds' " about the obligation to finance and construct the three power plants (J.S. 11-16, quoting L. Tribe, *American Constitutional Law* 470 (1978)). In support of this argument appellant cites section 5(a) of WPPSS's Project Agreements with BPA. That provision states

that WPPSS will use its best efforts to issue and sell bonds to finance construction, "*provided* * * * that in each such case such Bonds may then be legally issued and sold" (E.R. 201). Appellant also cites a statutory provision (Wash. Rev. Code Ann. § 43.52.3411 (1970)) subjecting WPPSS, like other state public utility districts, to all relevant present and future conditions governing the issuance of revenue bonds (J.S. 12-13).

Requiring that the promised bonds be "legally issued," as section 5(a) does, is obviously different from authorizing the passage of laws to inhibit the issuance of bonds. Like the requirements in § 43.52.3411, section 5(a) assures "compliance with regular and broadly applicable bonding requirements of the state for the issuance of bonds" (J.S. App. 10a). Section 5(a) plainly contemplates, for example, that "[t]he resolution authorizing the issuance of the bonds shall fix the rate or rates of interest * * * and the place and date of the payment of both principal and interest." See Wash. Rev. Code Ann. § 54.24.018 (Supp. 1982). But the only benefit BPA contracted for—in return for assuming an obligation to pay $20 billion in principal and interest (see note 8, *supra*)—was completion of the plants. "WPPSS's ability to issue additional bonds [to finance completion] was accordingly the centerpiece of the entire arrangement" (J.S. App. 11a). To suppose that the contract left WPPSS free to renege on that obligation " 'is an absurdity.' " *United States Trust Co.* v. *New Jersey*, *supra*, 431 U.S. at 25 n.23, quoting *Murray* v. *Charleston*, 96 U.S. 432, 445 (1877).[12] Passage of

[12] One who contracts to construct a building for the state in accordance with "lawful" building code specifications hardly agrees that, half way through the job, the state can hold a referendum and walk away from the contract.

a law such as Initiative 394 was a possibility far beyond the "reasonable expectations" of WPPSS and BPA when they signed the Project Agreements. *Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.*, No. 81-1370 (Jan. 24, 1983), slip op. 15.

Nor does the existence of § 43.52.3411 afford any additional justification for impairment of the Project Agreements or bond resolutions. That section provides that WPPSS bonds are subject, for example, to "all the provisions of law as now or hereafter in effect relating to * * * interest rate[s]", but it surely does not mean that the State can lower the rate for bonds already issued (J.S. App. 13a). For the same reason it does not authorize the State to forestall the issuance of bonds promised to BPA (in return for its contractual undertakings) and to existing bondholders (to assure "the payment and security of the[ir] Bonds") (E.R. 994). The legislature's evident purpose, in subjecting WPPSS bonds to "all the provisions of law as now *or hereafter* in effect relating to revenue bonds * * * of public utility districts", was simply to avoid the need to amend chapter 43.52 every time it amended the chapter dealing with public utility district revenue bonds. It is perverse to read into those terms the authority to prevent issuance of bonds already contracted for, when the very same section states that WPPSS "shall have power to issue revenue bonds * * * [w]henever the board * * * shall deem it advisable * * *." § 43.52.3411.

Appellant errs in suggesting that the language in section 5(a) of the Project Agreements—which fails in any event to support its claim—should be strictly construed against BPA (J.S. App. 15-16). It is

doubtful, in the first place, that this Court has adopted such a rule of construction. See *Owensboro* v. *Cumberland Telephone Co.*, 230 U.S. 58, 74 (1913) (when "the right * * * *to destroy* a contract * * * is claimed, it must be clear and explicit") (emphasis added). Cases like *Charles River Bridge* v. *Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837), offer little support for appellant's suggestion, involving as they do "public grants" "in [the] nature of monopolies" (*id.* at 545-546) rather than obligations incurred by the government in return for enormous financial benefit. In any event the principle advanced, if it derives from concern for the public interest, would be out of place where the constituency served by a public agency like BPA is, if anything, broader than that protected by the reservation.

B. The State Has No Reserved Power To Submit Existing Contractual Obligations To Voter Approval

Appellant also argues that—regardless of their explicit terms—WPPSS's contracts with BPA and the bondholders are subject to certain sovereign powers that cannot be covenanted away (J.S. 16-18). Among these, appellant claims, is the state's sovereign authority to "*alter the structure of governance of its political subdivisions*" (J.S. 16)—in this case, to determine "*who shall decide*" whether WPPSS may issue future bonds (J.S. 17).

This contention is frivolous. It ignores the fact that the State, through WPPSS, has *already* decided to finance these three plants to completion. The State is entirely free to alter the powers of operating agencies like WPPSS. What it may not do is abrogate contracts already undertaken by such agencies through

the simple expedient of resubmitting them for voter approval.[13]

In any event, as this Court has noted, "the scope of the State's reserved power depends on the nature of the contractual relationship with which the challenged law conflicts. * * * * * When a State impairs the obligation of its own contract," claims of reserved power are scrutinized more carefully. *United States Trust Co.* v. *New Jersey, supra*, 431 U.S. at 21-23. Financial undertakings that have proved more burdensome than expected cannot be avoided by arguing that a state reserves "the future exercise of the taxing and spending powers" (*id.* at 24). To the extent that Initiative 394 is designed to limit public spending (J.S. App. 18a), appellant's argument is simply that "completion of the projects as contracted by WPPSS ha[s] become too expensive" (*ibid.*).

C. Initiative 394 Substantially Impairs WPPSS's Contractual Obligations

Appellant next argues that even if Initiative 394 was not authorized by express or implied reservation, it is consistent with the Contract Clause because it does not substantially impair the contracts WPPSS had with BPA and the bondholders (J.S. 18-21). This is so, it urges, because the Initiative is not a "but for" cause of any financial harm to BPA and the bondholders, and because it was a response to unanticipated events—and thus upset no "legitimate expectations of the parties" (*id.* at 19).

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[13] To say that Initiative 394 falls within the essential attributes of sovereignty simply because it requires a referendum is to invoke a principle without limits. Any contract that a state later deems improvident could be put to a vote, with predictable results. See also *Shapleigh* v. *San Angelo*, 167 U.S. 646, 657 (1897).

It is obvious that the Initiative has caused financial harm to BPA and the bondholders. As the court of appeals pointed out (J.S. App. 14a-15a):

> The issuance of additional bonds by WPPSS is essential to the performance of its contracts; it is particularly crucial to the obligation running from WPPSS to BPA. * * * Bonds necessary for completion of the projects can only be issued after approval of the proposed expenditure of the proceeds by the electorate at a popular referendum. No standard can be imposed on the electorate in exercising its decision, nor can it be subjected to any review. It can reject the proposal for any reason or no reason.

In short, whether BPA gets (from the completed projects) any power in return for its agreement to pay $20 billion in principal and interest has been turned over to the unreviewable discretion of the voters. It is of course possible, as appellant suggests (J.S. 28), that the voters will approve the necessary financing. It is also possible that the result would be favorable if it had been made to turn on the flip of a coin. But the State cannot require the federal government to play roulette by claiming that no harm occurs until the game is played out. As a legal matter, impairment occurs when the state passes a law repudiating a contractual obligation, not when the repudiation causes financial loss to a party. *United States Trust Co.* v. *New Jersey, supra* (bondholders need not wait until state fails to pay principal or interest).

Even if the projects were not terminated by referendum, the Initiative creates an obvious threat of construction delay. We are informed that WPPSS currently estimates it has funds to continue construction on Projects 2 and 3 until May of this year (cf. C.R.

143, at 22).[14] If WPPSS is unable to issue bonds after that date, construction will be delayed. During such a delay it could cost up to $5 million per month to maintain one of the projects (C.R. 140, at 109, 135). Moreover, there would be direct costs as high as $250 million associated with stopping and resuming construction on a project (C.R. 143, at 28). When coupled with increases due to additional interest and cost escalation, the cost of a one-year delay followed by a resumption of construction could be as high as $650 million per project (E.R. 1367; C.R. 140, at 109-110).

The referendum requirement impairs the rights of the bondholders as well as BPA. BPA remains obligated to insure payment of the bonds, but the bondholders can no longer be confident of revenues that were to be paid to WPPSS in return for power from the plants. This impairment of their security has had, as the district court found (J.S. App. 21a-22a), the predictable result of reducing the value of their bonds on the secondary market. It has also provoked leading evaluating services such as Moody's Investor Service and Merrill Lynch to downgrade the bonds (Exh. 48; E.R. 1425). Their claim of substantial impairment is even more compelling than the one this Court found sufficient in *United States Trust Co.* v. *New Jersey*, *supra*, 431 U.S. at 19.

Appellant's argument that Initiative 394 works no substantial impairment because it responds to an unexpected problem is also without merit. As the court of

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[14] "C.R." refers to the Clerk's Record in the district court. WPPSS can stretch out work on Project 3 by a few months if it continues to operate on a four-day work week. It is also possible that BPA, with congressional approval, could finance completion of Project 2 out of its operating revenues, though that is of course not what the parties contracted for.

appeals noted (J.S. App. 4a), the contracting parties *did* foresee the possibility that completion of the plants in light of changed circumstances might be contrary to "Prudent Utility Practice." They accordingly included an express contractual standard to deal with that possibility, and a process for resolving disagreements between BPA and WPPSS about whether termination was warranted in light of "Prudent Utility Practice" (E.R. 198-199, 212). Initiative 394 simply ignores the contractual standard and substitutes a different process for dealing with changed circumstances, in an evident effort to authorize termination where the Project Agreements forbid it.

The case is thus different from *Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.*, *supra*, in two ways. First, the Court there found it "highly unlikely" that the parties had anticipated the deregulation of gas prices by the Natural Gas Policy Act of 1978, 15 U.S.C. (Supp. V) 3301 *et seq.* Rather, "the contracts were structured against the background of regulated gas prices." Slip op. 14. The Kansas Natural Gas Price Protection Act thus did not upset the parties' expected procedure for price determination, but responded to a contingency the contract had not provided for. Second, and perhaps more important, the Court emphasized that "[i]f deregulation had not occurred, the contracts undoubtedly would have called for a much smaller price increase than that provided by the Kansas Act[]" (*ibid.*). The party complaining of state impairment was in fact deprived of nothing more than windfall profits from unexpected deregulation. Cf. *City of El Paso* v. *Simmons*, 379 U.S. 497, 515 (1965). Here, by contrast, Initiative 394 could deprive BPA of the only benefit it contracted for—completion of the projects—under circumstances that do not meet the contractual standard for termination.

D. The Substantial Impairment Caused By Initiative 394 Cannot Be Excused As Reasonable And Necessary

Appellant's final argument under the Contract Clause is that even if Initiative 394 causes a substantial impairment of the rights created by contract, the law is nonetheless constitutional because it is "*reasonable and necessary to serve an important public purpose*" (J.S. 21, quoting *United States Trust Co.* v. *New Jersey, supra*, 431 U.S. at 25). Appellant also asserts that great deference is due the State's justification for the Initiative because the contracts impaired are not its own, but those of a municipal corporation (J.S. 21-22).

The latter proposition is specious. This Court has recognized no such distinction between municipal and state contracts. *United States Trust Co.* v. *New Jersey, supra*, for example, noted (431 U.S. at 24):

> the Court has regularly held that the States are bound by their debt contracts.[22]

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[22] State laws authorizing the impairment of municipal bond contracts have been held unconstitutional. *W.B. Worthen Co.* v. *Kavanaugh*, 295 U.S. 56 (1935); *Louisiana* v. *Pilsbury*, 105 U.S. 278 (1882). Similarly, a tax on municipal bonds was held unconstitutional because its effect was to reduce the contractual rate of interest. *Murray* v. *Charleston*, 96 U.S. 432, 443-446 (1878).

The Court relied upon the same authorities in *Energy Reserves Group, Inc.* v. *Kansas Power & Light Co., supra*, in saying (slip op. 11 n.14): "In almost every case, the Court has held a governmental unit to its contractual obligations when it enters financial or other markets." See also Schulz, *The Effect of the Contract Clause and the Fourteenth Amendment Upon the Power of the States to Control Municipal Corpora-*

tions, 36 Mich. L. Rev. 385, 401-408 (1938). The similarity in treatment should not be surprising, since states can act only through agents of one form or another, and a municipal corporation is "a mere agent of the State * * *." *New Orleans* v. *New Orleans Water Works Co.*, 142 U.S. 79, 91 (1891).

Indeed, *United States Trust Co.* v. *New Jersey* itself involved a statutory provision that impaired the security of bonds issued by the Port Authority, not by the state. Though it is true that the covenant impaired was adopted by statute (431 U.S. at 9-10), the role of the State in the consummation of these contracts is no less significant. WPPSS, as a "joint operating agency," is a creature of a state law. Wash. Rev. Code Ann. § 43.52.360 (Supp. 1981). The state legislature has specifically empowered it to construct power plants like those at issue here (*ibid.*), and to issue revenue bonds to finance construction (*id.* § 43.52.3411). In fact, the State specifically authorized WPPSS to construct these three projects by executing site certification agreements with WPPSS.[15] Whether the state acts directly or through an "operating agency," the case is different from contracts between private parties for the simple reason that future contingencies affecting the public interest can be taken into account at the bargaining stage. Note, *A Process-Oriented Approach to the Contract Clause*, 89 Yale L. J. 1623, 1647 & n.115 (1980). Subsequent claims that impairment is "reasonable" and "neces-

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[15] WPPSS obtained the site certification agreements pursuant to Wash. Rev. Code Ann. ch. 80.50 (Supp. 1981). The Code specifies that such agreements "bind the state and each of its * * * political subdivisions * * * as to the approval of the site and the construction and operation of the proposed energy facility." *Id.* § 80.50.120.

sary" are therefore more suspect. Moreover, the claim of the party dealing with the government that he is entitled to rely on its promises is more compelling. Public commitments are, in short, governed by "a simple constitutional principle: *government must keep its word.*" L. Tribe, *American Constitutional Law* 470 (1978).

Measured by the appropriately non-deferential standard, *United States Trust Co.* v. *New Jersey*, *supra*, 431 U.S. at 26, appellant's claim that Initiative 394 is "reasonable and necessary" must fail.[16] An impairment of contract is not reasonable when it is drawn with "an extremely narrow focus," rather than to address a broad social concern. *Allied Structural Steel Co.* v. *Spannaus*, *supra*, 438 U.S. at 248. But as the court of appeals recognized, "[t]he Initiative [is] * * * narrowly targeted to modify th[e]se very contracts, rather than being part of a broad public program with incidental impairing effects" (J.S. App. 18a-19a). Because the law applies only to 250 megawatt plants (*id.* at 26a-27a), its *only* effect is on five plants that were to be built by WPPSS—the three contracted for with BPA, and two others that have been terminated (*id.* at 6a & n.7). Moreover, the

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[16] Not only has appellant failed to show that the Initiative is a "reasonable and necessary" modification of these contracts; it is also doubtful that that standard can be applied to the federal government. The power to make "reasonable and necessary" modifications to contracts derives from the "continuing and dominant protective power" of the state to promote the greater public welfare by regulating private contract rights. *Home Building & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398, 437 (1934). But under the Supremacy Clause (Art. VI, § 2) the state has no power to advance its citizens' welfare at the expense of the even larger public served by the federal government.

financing costs assumed by BPA would ultimately be passed on to ratepayers not just in the state of Washington, but throughout the Pacific Northwest (E.R. 98, 1355-1370). The decision to terminate the projects, on the other hand, and to give those ratepayers nothing for the costs they will have to bear, is left by the Initiative with voters in the political subdivisions that make up WPPSS.

Nor is it even possible to maintain, as appellant does (J.S. 23-24), that these objectionable features are a response to circumstances unforeseen when the contracts were signed. Cf. *United States Trust Co.* v. *New Jersey*, *supra*, 431 U.S. at 31-32. To keep the matter in perspective, it should be noted that the Pacific Northwest has had and "will continue to enjoy electricity prices which * * * are significantly lower than the national average" (E.R. 1513). It is true that there have been cost increases and delays in the construction of these plants. But as pointed out above, pages 6 note 10, 14-15, those concerns were known when these contracts were signed, and the Project Agreements included provisions for termination of construction whenever that step was dictated by "Prudent Utility Practice." Even if the problems encountered have been more severe than anticipated, the change has been "of degree and not of kind." *United States Trust Co.* v. *New Jersey*, *supra*, 431 U.S. at 32. It does not justify the substantial impairment effected by Initiative 394.

Not only is the Initiative unreasonable; it is also not the only way to deal with the problems of cost, delay, and mismanagement appellant complains of. As this Court stressed in *United States Trust Co.* v. *New Jersey*, *supra*, 431 U.S. at 30-31, "a State is not completely free to consider impairing the obligations of its own contracts on a par with other policy alternatives.

Similarly, a State is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well."

Appellant advances three objectives purportedly served by the Initiative. One is "to provide a mechanism for citizen review and approval of proposed financing for major public energy projects" (J.S. 26). But that is simply another way of saying that financing already agreed to by contract should be reconsidered in a referendum. It is true that a referendum is the only way to accomplish "citizen review," but as we noted above, note 13, that tactic could be employed to excuse impairment of any contract the state might sign. The issue is really whether there are other ways of controlling cost, delay, and mismanagement. One obvious method is to exercise the control the voters already had over WPPSS's management. See Wash. Rev. Code Ann. §§ 43.52.370, 54.12.010 (Supp. 1981) (election of board of directors). Other possibilities were offered by the State Senate Energy and Utilities Committee (E.R. 1329-1335), on whose Inquiry appellant relies so heavily (J.S. 5, 23). It is noteworthy that the Committee did not suggest adoption of the Initiative as a way of accomplishing its goals,[17] and the State legislature specifically declined to adopt such a measure (E.R. 1396-1407).

A second objective advanced by appellant is nothing more than a variation on the first: "to 'require WPPSS to live within stated budgets' " (J.S. 27). Though appellant speaks of this as a "*process* goal," not a "substantive goal" (*id.* at 28), it once again

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[17] Several of the Committee's suggestions have in fact been adopted by the State. 1982 Wash. Laws (1st Ex. Sess.) ch. 43, § 3 (creation of an executive board with outside members); 1982 Wash. Laws (1st Ex. Sess.) ch. 44 (amendment to competitive bidding requirements).

means simply that future financing WPPSS has contracted to provide cannot be provided unless the voters approve it.

Appellant's third objective is "to 'require' that WPPSS consider cost-effectiveness criteria in making future financing decisions" (J.S. 27). But Initiative 394 in no way ties voter approval or rejection of further financing to a project's cost-effectiveness. In any event, as the court of appeals correctly noted, that matter is no longer an issue, since "WPPSS has already undertaken to obtain cost effectiveness studies for the three projects" (*id.* at 17a n.13).[18]

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[18] There is no merit to appellant's contention that the court of appeals' decision should be summarily reversed because it overlooked the district court's alleged violation of Fed. R. Civ. P. 52 (J.S. 28-30). The case was submitted largely on stipulated facts and exhibits. See E.R. 90-118, 176-178. The district court explicitly adopted as findings the 105 paragraphs of stipulated facts contained in the amended pretrial order (E.R. 173). When the district court made oral findings on the disputed issues, counsel for the State represented to the court that the State and the appellant found them satisfactory (E.R. 176-178):

> THE COURT: * * * I will consider entering written findings of fact if the parties request it, or do you think I have covered it in my oral decision?
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> * * * * *
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> MR. GOLTZ: Your Honor, I think Mr. Heineman and I agree that the oral decision of the Court is fine, and it certainly saves everyone else a lot of time.
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> THE COURT: * * * I will then consider what I have said in my oral decision as the findings of fact and conclusions of law in the case. If you do not think so, if you do not think it is sufficient upon which to base an appeal if one is forthcoming, then I would request that you assist me in doing so.
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> MR. GOLITZ: Your Honor, as I said, the defendants agree that your oral decision would be fine with us.

Because the questions raised by appellant are so clearly unsubstantial as not to need further argument, the decision of the court of appeals should be affirmed summarily.

II. APPELLANT LACKS STANDING TO APPEAL

This appeal has been filed by a self-proclaimed "citizens' group that drafted and campaigned for Initiative 394" (J.S. 3). The State of Washington itself, its Governor, Attorney General, and Secretary of State—against whom this action was brought by the United States and the trustees for the bondholders, and who alone are subject to the district court's injunctive order—have decided not to appeal. That decision is the result of an agreement reached between the State and WPPSS on February 11, 1983 ("Agreement").[19] The State concluded, after the court of appeals' decision, that it was "in the * * * interests of the State, its citizens, and the Washington Public Power Supply System" to terminate this litigation (Agreement 1). Accordingly it "promise[d] and agree[d] *not to seek review* by the United States Supreme Court" of the Ninth Circuit's decision (*id.* at 4; emphasis in original).[20] The Agreement was signed by the State Attorney General, who is charged under state law with the obligation to "[d]efend all actions * * * against any state officer or employee acting in his official capacity, in any of the courts of

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[19] Copies of the Agreement have been lodged with this Court and furnished to counsel for appellant.

[20] WPPSS undertook to file with the Secretary of State its "substantially completed" cost-effectiveness studies for Projects 2 and 3, and to do similar studies for Projects 1 (now postponed), 4 and 5 (now terminated) if and when they should be revived (Agreement 2-3).

this state or the United States * * *." Wash. Rev. Code Ann. § 43.10.030 (Supp. 1981); see also *id.* § 43.10.040. As the State's courts have recognized, the Attorney General is vested with discretion to consider both practical litigational difficulties and the likelihood of benefit to the State from pursuit of judicial redress. *Berge* v. *Gorton*, 88 Wash. 2d 756, 567 P.2d 187 (1977); *Boe* v. *Gorton*, 88 Wash. 2d 773, 567 P.2d 197 (1977).

Appellant was not a defendant in the suits brought by the United States and the banks. It intervened in the district court claiming that "its unique * * * role in helping to secure passage of Initiative 394 * * * satisfie[d] the requirements for intervention of right," "or at least permissive intervention, pursuant to Fed. R. Civ. P. 24 (Memorandum Of The Don't Bankrupt Washington Committee In Support Of Motion To Intervene As A Defendant at 6, 18).[21] However correct the district court's decision to permit intervention, there is a difference between participation in a live controversy between the plaintiffs and the State, and carrying the action forward alone after the State has decided it should be terminated.[22] In the former case,

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[21] The district court's order does not state whether appellant was allowed to intervene permissively or of right. Copies of the Memorandum In Support Of Intervention and the court's order have been lodged with this Court.

[22] Cf. *Director, OWCP* v. *Perini North River Assocs.*, No. 81-897 (Jan. 11, 1983), slip op. 4-8; *Princeton University* v. *Schmid*, 455 U.S. 100, 102-103 (1982). In *Perini North River Assocs., supra*, the injured employee was actually before this Court as a nominal respondent urging reversal. In this case, by contrast, appellant has acknowledged that the State and its officials "have no interest in the outcome of this appeal" and has so informed the Clerk pursuant to Rule 10.4 of the Rules of this Court. A copy of the letter is included an an addendum to the Motion to Dismiss or Affirm (A-8 to A-9) filed by

both Article III and prudential requirements are satisfied by the controversy between the original parties. In the latter situation the intervenor must demonstrate that it has an appealable interest, i.e., that it independently satisfies the traditional standing requirements.[23] In this case it is clear that appellant does not.

Continental Illinois National Bank and Trust Company of Chicago.

[23] See *Boston Tow Boat Co.* v. *United States*, 321 U.S. 632 (1944); *Barry* v. *District of Columbia Board of Elections*, 580 F.2d 695, 697-698 (D.C. Cir. 1978); *United States* v. *Imperial Irrigation District*, 559 F.2d 509, 521 (9th Cir. 1977), rev'd in part and vacated in part *sub nom. Bryant* v. *Yellen*, 447 U.S. 352 (1980); Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 Harv. L. Rev. 721, 753-754 (1968).

In *United States* v. *Imperial Irrigation District*, *supra*, the Ninth Circuit permitted a group of intervenors to appeal in an action brought by the government, after the government had decided not to appeal. This Court upheld the intervenors' standing to appeal. *Bryant* v. *Yellen*, *supra*, 447 U.S. at 365-368. The Court noted explicitly that the intervenors' "interest is not 'shared in substantially equal measure by all or a large class of citizens,' * * * because [they] are residents of the Imperial Valley who desire to purchase the excess land for purposes of farming." 447 U.S. at 367 n.17. In this case, by contrast, appellant's interest in defending Initiative 394 is not in any sense individual, "since 394 is aimed at benefiting all the citizens of the State" (J.S. 24). In the former case the uniqueness of the intervenors' claim may undermine the usual presumption that the government adequately represents them. See 7A C. Wright & A. Miller, *Federal Practice and Procedure* § 1909, at 530-531 (1972). In this case, by contrast, it is indisputable that the party "best suited to assert [the] claim" raised by appellant is the State itself. *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 (1979). The very purpose of the prudential rules of standing is to "limit access to the federal courts" to parties of that description (*ibid.*).

The simplest way of measuring appellant's interest against traditional standing requirements is to suppose that the State, rather than acquiescing in a declaration that its law was unconstitutional, had taken the comparable step of repealing the law. See Wash. Const. Amend. 26. In that case it would be evident that appellant had no basis for seeking to override the decision that elected representatives had made on behalf of all the people of the State.[24] The same is true here. This is not a case where a private party asserts a superior federal right that overrides state officials' decision to enforce [25] or not to enforce [26] state law. Nor is it a case where the state official charged with enforcement of state law does not do so, and the party alleging standing is able to assert an independent state statutory right to litigate on its own.[27] Indeed, it is not even a case where a private party has asserted (by way of mandamus, for example) that state officials have neglected a duty imposed on them by state law in failing to perform their enforcement or other functions.[28] Unlike the private parties in those cases, appellant has no substantive principle to use as a fulcrum for overturning the court of ap-

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[24] *Utility Contractors Ass'n* v. *Toops*, 507 F.2d 83, 86 (3d Cir. 1974) ("had any of the municipalities chosen voluntarily to change its building code, the appellants' monetary interests would not have conferred legal standing to prevent such governmental action").

[25] See *Everson* v. *Board of Education*, 330 U.S. 1 (1947); *Roe* v. *Wade*, 410 U.S. 113, 124 (1973).

[26] Cf. *Linda R. S.* v. *Richard D.*, 410 U.S. 614 (1973).

[27] Wash. Rev. Code Ann. §§ 19.86.080, 19.86.090 (1978) (Consumer Protection Act).

[28] See *Boe* v. *Gorton, supra; State ex rel. Lemon* v. *Langlie*, 45 Wash. 2d 82, 273 P.2d 464 (1954). Cf. *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975).

peals' decision, except a state law which the State itself has now chosen to abandon.[29] The State's elected representatives—having vigorously defended the constitutionality of Initiative 394 and lost on two occasions, "having considered all matters relating to the availability of review by the United States Supreme Court" "and the consequences to the citizens of the state by continuing this litigation"—"have concluded that it is in the mutual interests of the State, its citizens, and the Washington Public Power Supply System" to drop its defense of the Initiative (Agreement 1, 4).

It may be conceded that Initiative 394 was passed to promote interests like those appellant asserts. But where the State has litigated the validity of its law and decided to acquiesce in a holding that it is unconstitutional, it is not the prerogative of private citizens to revive the law through further litigation, even if they might benefit in an abstract way by doing so. The doctrine of standing focuses above all "on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." *Flast* v. *Cohen*, 392 U.S. 83, 99 (1968). Because standing rules "limit access to the federal courts to those litigants best suited to assert a particular claim[,] * * * a litigant normally must assert an injury that is peculiar to himself or to a distinct group of which he is a part, rather than one 'shared in substantially equal measure by all or a large class

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[29] As this Court noted in *Warth* v. *Seldin*, 422 U.S. 490, 500 (1975), "standing * * * often turns on the nature and source of the claim asserted. * * * [T]he source of the plaintiff's claim to relief assumes critical importance with respect to the prudential rules of standing that, apart from Art. III's minimum requirements, serve to limit the role of the courts in resolving public disputes."

of citizens.'" *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 (1979), quoting *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975).[30] In the latter case the proper representatives of the citizenry are the state itself and its elected officials. If factions within the public are unhappy, "our system provides for changing members of the political branches when dissatisfied citizens convince a sufficient number of their fellow electors that elected representatives are delinquent in performing duties committed to them." *United States* v. *Richardson*, 418 U.S. 166, 179 (1974).

Because appellant lacks standing to appeal, the appeal should be dismissed for lack of jurisdiction.

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[30] There can be no doubt that appellant's asserted interests fit the latter description. Appellant may have worked harder than other groups to assure passage of the Initiative, but it did not thereby acquire a greater interest in the referendum process set up by the law. Appellant also suggested to the district court that utility ratepayers contributed money to the Committee, though it did not assert that, as a nonprofit corporation, it has members who are ratepayers. (Affidavit of Steve Zemke 3, 7. We have lodged with the Court a copy of this affidavit, introduced in the district court in support of appellant's motion to intervene.) Moreover, the 19 public utility districts and four municipalities that make up WPPSS cover the better part of the state (E.R. 1363A-1363B), and any claim that rates may be affected if the Initiative is struck down would be "'shared in substantially equal measure by * * * a large class of citizens.'" *Gladstone, Realtors* v. *Village of Bellwood*, *supra*, 441 U.S. at 100, quoting *Warth* v. *Seldin*, *supra*, 422 U.S. at 499. In any event, as the Motion of Appellee Continental National Bank and Trust Company of Chicago to Dismiss or Affirm (at 14-17) demonstrates, appellant's claim of economic harm is too conjectural to serve as a basis for standing.

CONCLUSION

The appeal should be dismissed for lack of jurisdiction. In the alternative, the judgment of the court of appeals should be summarily affirmed.

Respectfully submitted.

REX E. LEE
Solicitor General

MARCH 1983

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No. 82-1445

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE DON'T BANKRUPT WASHINGTON COMMITTEE,
Appellant,

v.

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, SEATTLE-FIRST NATIONAL BANK AND MORGAN GUARANTY TRUST COMPANY OF NEW YORK, AND THE UNITED STATES OF AMERICA,
Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit

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BRIEF OF APPELLANT IN OPPOSITION TO APPELLEES' MOTIONS TO DISMISS OR AFFIRM

STIMSON BULLITT
RIDDELL, WILLIAMS, BULLITT & WALKINSHAW
4400 Seattle-1st National Bank Building
Seattle, Washington 98154
206/634-3600

BENJAMIN W. HEINEMAN, JR.*
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
202/429-4000

Counsel for the Don't Bankrupt Washington Committee, Appellant

Dated: March 29, 1983 * Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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BRIEF OF APPELLANT IN OPPOSITION TO APPELLEES' MOTIONS TO DISMISS OR AFFIRM

STATEMENT OF THE CASE

Like the Court of Appeals' statement, appellees' descriptions of the case are erroneous in constitutionally significant ways because they ignore Initiative 394's history, are unclear about the contract terms allegedly impaired and are misleading about 394's present effect. First, appellees erroneously present their case as if WPPSS had not created a crisis for the State's citizens in 1981. But they *do not dispute*, even if they do not mention, that WPPSS mismanagement was the most significant cause of $20 billion cost-overruns; that neither WPPSS nor BPA had started much needed cost-effectiveness studies of the Projects in 1981 when 394 was passed; that the contractual duty to issue future bonds is not absolute but conditioned on, *inter alia*, cost-effectiveness; and that BPA's "oversight" role and the vague "Prudent Utility Practice" standard of the contracts had not prevented gross WPPSS mismanagement, unprecedented cost-overruns, huge schedule delays, failure to study cost-effectiveness and, according to appellee Morgan, billions "wasted" and a WPPSS construction budget "out of control." J.S. 2-7.

Second, appellees erroneously present their case as if a *substantive* "no" vote has already occurred under 394's voter approval mechanism and as if the Projects are going to be terminated. See, *e.g.*, U.S. Mot. 3, 8, 9, 13, 15. But a vote under 394 has not been scheduled or held. Most importantly, according to uncontradicted testimony from leading bond experts, either a "yes" or a "no" vote in such an election could benefit appellees. J.S. 7. Thus, the Initiative is not an attempt by the citizens to avoid existing debt obligations, terminate any of the Projects or repudiate any other substantive financial obligations. In fact, a vote under 394 cannot mandate such results. Instead, the Initiative establishes an external procedural check on the exercise of WPPSS' discretion in light of

WPPSS' gross abuse of that discretion. The Initiative merely gives voters a voice in the decision about whether they shall shoulder *additional* multi-billion dollar debt after publication of an independent cost-effectiveness study describes the economic assumptions and public policy implications underlying that decision.[1]

ARGUMENT

Like the Court of Appeals' decision, appellees maintain that this case is controlled by *U.S. Trust*. But it is far different. It presents the profound constitutional question of whether the federal judiciary, using the Contract Clause, can substitute its judgment for the decision of the state's citizens, when they acted through the initiative power in a robust, wide-open, year-long election process to gain control of a political subdivision which had gone out of control in dramatic and unforeseen ways and which had created a nationally known financial "fiasco." J.S. n.2. In fact, the Court of Appeals' decision striking down a moderate, procedural response to the crisis created by WPPSS' $20 billion cost-overruns is in direct conflict with this Court's doctrines or presents important, unresolved constitutional questions. See R. Lee, A Lawyer Looks At The Constitution 99 (1981) (major questions on interpretation of the Clause remain after *U.S. Trust*).

(1) *The Express Reservation Doctrine.* In attempting to avoid the force of appellant's argument, J.S. 11-16, that 394 is within the powers expressly reserved to the State under the very statute authorizing WPPSS to issue bonds, RCW § 43.52.3411, and that the Court of Appeals violated this Court's express reservation doctrine, appellees make basic constitutional mistakes. First, they do not analyze the precise, unequivocal language of the provision or show any ambiguity, U.S. Mot. 9-10, and instead

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[1] If any Project is not completed, debt service on outstanding bonds will ultimately be paid by *individual* ratepayers who will be charged higher rates by BPA or utilities participating in the WPPSS Project—and not by a disembodied institution called BPA or WPPSS.

spin out strained interpretations not based on statutory text. Second, they try to mislead this Court by claiming that express reservation clauses are without constitutional limit and could be used to destroy all contractual rights. *Id.* 10. But, although changes made under express reservation clauses are outside Contract Clause strictures, they are subject to Due Process limits. J.S. 11-12. Thus, the State could not use the express reservation in Section 3411 to "lower the [interest] rate for bonds already issued," U.S. Mot. 10, because that would constitute an unlawful "taking." But changing the process for deciding whether to issue additional bonds, as 394 does, would not constitute a taking and, in any event, Due Process issues are not before this Court. Third, the long-standing rule in Contract Clause cases that contracts of state entities are to be construed against plaintiffs is not affected by the United States' flatly erroneous citation of *Murray* v. *Charleston*, 96 U.S. 432 (1878) and *Owensboro* v. *Cumberland Telephone Co.*, 230 U.S. 58 (1913). U.S. Mot. 9, 11. Those cases stand for the proposition that the power of a state to change its mind with respect to contracts must generally be express, *not implied*, so that parties are on notice. J.S. n.16.[2] The *express* reservations of Section 3411 and Section 5(a) of the Project Agreements must thus be construed in favor of the State under the historic rule of *Charles River Bridge* and progeny. *Id.*[3]

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[2] *Owensboro* involved an express reservation to change a city ordinance, but not an express reservation to change contract. The "clear and explicit" language is used by the Court there for the proposition that reservations to change contract must be express, not implied. 230 U.S. at 74-75. Here, § 3411 is expressly part of all contracts.

[3] The discussion of Section 3411 in the motion of Seattle-First and Morgan ("Seafirst Mot." 12-14) is confused and has no weight in the face of Section 3411's unambiguous express reservation ("laws hereafter in effect . . . shall apply . . . without limitation . . . to . . . covenants . . . and the effect thereof . . . and the issuance [and] sale of . . . bonds . . ."). This express reservation in the fourth sentence of 3411 clearly qualifies the power of the board

BPA and the bondholders entered into the contracts with WPPSS on clear notice through Section 3411 that WPPSS' authority to issue bonds was subject to subsequent changes in State law. The *"provided, however"* express reservation in Section 5(a) of the Project Agreements shows this BPA awareness, J.S. 14, and the United States admits as much since it concedes that Section 3411 "subjects WPPSS" to *"all* relevant present and future conditions governing the issuance of revenue bonds." U.S. Mot. 9 (emphasis added). The Initiative's procedural requirements for future bond issuance constitute just such conditions.

(2) *The Reserved Powers Doctrine.* In attempting to avoid the force of appellant's argument that 394 is within this Court's Reserved Powers Doctrine, that it is thus outside the strictures of the Contract Clause and that the Court of Appeals committed fundamental constitutional error in ignoring the Doctrine, J.S. 16-18, appellees once again make basic constitutional mistakes. First, they erroneously suggest that there are no constitutional limits on the sovereign Reserved Power to change the structure of governance and that power could destroy all contract rights. U.S. Mot. 11-12, n.13. But, as this Court has made clear, a change in contract protected from Contract Clause scrutiny by the Reserved Powers Doctrine is nonetheless subject to Due Process limits. J.S. n.17. Second, in an improper attempt to bring this case under *U.S. Trust*, appellees argue that the Initiative has imposed *substantive* financial limitations on WPPSS' contracts. For example, the United States talks vaguely about avoiding "financial undertakings that have proved . . . burdensome . . . ." U.S. Mot. 12. But, at present, 394 has only added procedural requirements to the decisionmaking process surrounding bond issuance. *No financial undertakings have been avoided.* The Initiative is thus squarely within the State's Reserved Power to change the structure

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found in 3411's second sentence to issue bonds when it shall deem it advisable. *Cf.* U.S. Mot. 10; Seafirst Mot. 12.

of governance of a political subdivision for future decisions—a power which is still valid under the longstanding holdings of this Court.[4] Summary reversal or plenary review to correct major constitutional error is thus required.

(3) *The "Substantial" Impairment Requirement.* Appellees also do not effectively rebut appellant's contention that the Court of Appeals failed to apply two legal standards for resolving the constitutional issue of substantial impairment established by recent decisions of this Court. First, under *U.S. Trust* and *Spannaus*, a challenged state law must be a "but for" cause of a substantial" modification to an "important" contractual term. J.S. 19. The United States does not dispute that this is an appropriate constitutional standard. Nor does it state that the Court of Appeals followed it. U.S. Mot. 12-15. The Court of Appeals simply did not hold, as it had to, that "mere existence" of the Initiative was a "but for" cause of a "substantial" modification of WPPSS' ability to issue bonds, especially since it was uncontradicted fact that WPPSS could have complied with the Initiative's procedural requirements in the fall of 1982, J.S. n.19, long

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[4] Appellees mistakenly rely on *Shapleigh* v. *City of San Angelo*, 167 U.S. 646 (1897), for the proposition that the Reserved Power to change the structure of governance of political subdivisions is without limits, U.S. Mot. n.13, and that 394 constitutes a change in substantive financial obligations. Seafirst Mot. 15. But *Shapleigh* involved only the attempted repudiation of *vested rights* by putting the right of San Angelo bondholders to receive debt service on *existing* bonds to a vote. Such a repudiation would violate the Due Process Clause and no such repudiation could be attempted here. In fact, the *Shapleigh* Court expressly noted that, unless it tried to avoid *existing* debt, the "State's plenary power over its municipal corporations to change their organization . . . [or] modify their method of internal government . . . is not restricted by contracts . . . with its creditors . . .". *Id.* at 654. Reliance on the Prudent Utility Practice standard is inappropriate here, Seafirst Mot. 16, because the District Court made *no* findings on this contested issue of fact, J.S. 28-30, and because PUP had proven ineffectual in preventing WPPSS' abuse of discretion and the crisis caused by $20 billion cost-overruns. See p. 1, *supra*.

before it stated it would need to return to the bond market for additional construction funds for Projects 2-3.[5]

Second, under *Spannaus* and *Energy Reserves*, a state law must also substantially upset the legitimate expectations of the contracting parties, including the expectations the contracting parties had if circumstances changed dramatically. J.S. 18-20. Again, the United States does not dispute that this is the appropriate constitutional standard after *Energy Reserves*. U.S. Mot. 14-15. Nor does it state that the Court of Appeals followed this standard and analyzed (a) whether the parties had any expectation when they entered into the contracts that there would be massive cost-overruns, gross WPPSS mismanagement, failure of BPA to control WPPSS mismanagement and lack of WPPSS cost-effectiveness studies or (b) whether these expectations, if any, were "reasonable" and were "substantially" upset by 394's external procedural requirements in light of WPPSS' abuse of discretion. Since BPA and the bondholders could not "reasonably" expect that the State would not impose external procedural checks on WPPSS after its abuse of the public

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[5] Rather than arguing that there has been substantial impairment of a contractual duty—the duty to issue bonds—the United States improperly lists some "harms" that were not found by the District Court. U.S. Mot. 13-14. (i) It again raises the spectre of termination—which has not remotely occurred. (ii) It raises the spectre of delay, and attendant cost, although no such findings were entered by the District Court or considered by the Court of Appeals and although the United States knows full well that WPPSS could have complied with 394 months ago before it needed funds and that it cannot go to the bond market now due to a host of other pending cases affecting the Projects. See Lempert, "Retreat From Nuclear Plants Fertilizes Seeds of Litigation," Legal Times, p. 1 (March 7, 1983). (iii) It raises injury to bondholders' security and market value, although the Court of Appeals did not rely on these "harms," and the District Court did not find them with appropriate specificity given the sharp factual dispute on these issues. See J.S. 28-30; Committee Brief in 9th Cir. 22-24. Reliance on the Prudent Utility Practice "standard" is subject to the same Rule 52 defects. U.S. Mot. 15; Seafirst Mot. 6. See J.S. 28-30: note 4, *supra*.

trust, this case should be summarily reversed or vacated and remanded under *Energy Reserves.*[6]

(4) *The Reasonable and Necessary Test.* Probable jurisdiction should be noted in this case because the Court of Appeals demonstrably misapplied the Contract Clause's ultimate "reasonable and necessary" test and because important, unresolved questions relating to application of the test are presented. Appellees' arguments only underscore the need for plenary review.

First, whether the strict or deferential application of the "reasonable and necessary" test should apply to state impairments of the contracts of an independent political subdivision that has gone out of control is a fundamental, unresolved question of constitutional law in the wake of *U.S. Trust* and *Energy Reserves.* J.S. 21-22. The contracts at issue here are expressly those of WPPSS and not of the State. As a municipal corporation, WPPSS has vast delegated power and is not—and never has been—subject to any direct executive control by officials elected at State-wide elections. As the United States admits, *U.S. Trust* is a much different case because it involved impairment of a covenant enacted by the State legislature, not contracts entered into by a political subdivision. U.S. Mot. 17. Most importantly, the two-tiered "reasonable and necessary" test was not clearly articulated by this

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[6] The United States is thus driven to treat this case erroneously as one involving "termination," U.S. Mot. 14-15, and to draw spurious factual distinctions. But *Energy Reserves'* holding of no substantial impairment is based on facts closely analogous to those presented here because unforeseen events with huge financial consequences for consumers/ratepayers occurred (deregulation of natural gas and WPPSS' mismanagement) and the parties were warned by express reservation clauses (a general one in *Energy Reserves* and a specific one here on the very subject—bond issuance—affected by State law changes). WPPSS mismanagement was a "contingency the contract had not provided for," to use the words of the United States. U.S. Mot. 15. And 394 has a less severe impact than the law in *Energy Reserves* because it only imposes procedural requirements and does not substantively affect amounts owing under contract.

Court when many of the cases cited by appellees, U.S. Mot. 16-17, were decided either in the 1930s or the 19th Century—and those cases were materially different than this one since they involved uncompensated "takings" of "vested" property rights that would have been invalid under either the Due Process or the Contract Clauses. *In sum, resolving the issue of whether state impairment of a political subdivision's contracts triggers the strict or deferential application of the "reasonable and necessary" test —or whether different types of impairment, i.e., changes in procedures, changes in substantive financial obligations, or outright, uncompensated takings trigger different applications of the test to the contracts of a political subdivision—is critical to the modern interpretation of the Contract Clause.* See *Spannaus*, 438 U.S. at 244-245 (severity of impairment determines degree of justification state must offer).

Second, the Court of Appeals manifestly misapplied the "reasonableness" in light of the circumstances test, J.S. 23-25, and the United States makes only a limp attempt to defend the decision below. U.S. Mot. 18-19. (a) It is absurd to argue that the problems of gross WPPSS' mismanagement and lack of cost-effectiveness studies were foreseen by the parties to the contracts, U.S. Mot. 19, especially when, as noted, J.S. 24, there is no evidence in the record, none cited by appellees and none found by the courts below that *the contracting parties* had any foreknowledge of the problems, or the type of problems, that gave rise to the Initiative. (b) It is similarly absurd to argue that the Initiative was "narrowly targeted" since 394 deals with broad, generalized problems, *Spannaus*, 438 U.S. at 250, that were created by WPPSS' mismanagement and that affected every citizen in the State. The appellees cannot blink away the Court of Appeals' fundamental misapplication of *all* the *Blaisdell-Spannaus* criteria that are at the historic core of Contract Clause adjudication. See J.S. 25.

Third, the Court of Appeals patently distorted the goals of the Initiative—goals which the United States has con-

ceded below—in misapplying the "necessary" test and substituting its judgment for the judgment of the voters. J.S. 25-28. In this Court, the United States abandons the Court of Appeals' opinion and tries to argue lack of necessity with respect to the goals the United States has conceded below. U.S. Mot. 20-21; J.S. 25-28. In so doing, it implicitly admits that the Court of Appeals did indeed demonstrably misapply the necessity test. In its discussion here, aside from offering naked policy speculation about "necessary" measures, the United States makes further crucial concessions. With respect to the first goal of 394, J.S. 26, it states that "It is true that a referendum is the only way to accomplish 'citizen review' . . .", U.S. Mot. 20, and is thus necessary to achieve that goal. Moreover, with respect to another goal of the Initiative—to require WPPSS to live within stated budgets—it simply discusses no specific alternatives less drastic than 394. *Id.*[7] In any event, if the United States' abandonment of the Court of Appeals' decision and its concessions in its motion are not sufficient to justify summary reversal, then plenary review should be granted to consider application of the necessity test in light of the actual goals of 394 conceded by the United States, rather than the distorted goals improperly used by the Court of Appeals in its willful disregard of 394's uncontradicted legislative history.

(5) *The Rule 52 Violation.* Appellees try to avoid reversal on the textbook violation of Rule 52, J.S. 28-30, by claiming that this case was "largely submitted on stipulated facts and exhibits." U.S. Mot. n.18. But the Pretrial Order clearly stated that the "parties agree that this pretrial order does not cover all areas of relevant fact." CR 170, ¶ 105. Moreover, the stipulated facts were merely a pro forma description of WPPSS, BPA and

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[7] The initiative power of the State is equal to or *higher than* the legislative power, and a failure of the legislature to act, U.S. Mot. 20, is thus evidence of necessity, not lack of necessity. Wash. Const., Art II, § 1(A); Trautman, Initiative and Referendum in Washington: A Survey, 49 Wash. L. Rev. 55, 66 (1973).

Projects 1-5 and did not address (and have not been shown by appellees to have addressed) such disputed factual issues as the meaning, if any, of the "PUP" standard or the legitimate expectations of parties. In addition to 80 pages of proposed findings of appellants below, appellees together filed nearly 50 pages. All were ignored by the District Court.[8]

(6) *Standing.* As an organization that drafted, and led the campaign for, an *initiative measure* and then intervened as a *party*, F.R. Civ. P. 24, and participated extensively below, appellant has standing to have its case heard by this Court on the merits. None of the cases cited by appellees hold to the contrary.[9]

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[8] Appellees' implication that appellant waived any right to specific findings after appellants below filed extensive proposed findings and after the District Court's summary, two day treatment of a complex case, J.S. 8, is simply wrong. U.S. Mot. n.18. The duty to make specific findings is the District Court's and cannot be waived by the parties. Rule 52(a), F.R. Civ. P. ("requests for findings are not necessary for purposes of review"); Wright & Miller, 9 Federal Practice & Procedure (1971), § 2574.

[9] The Committee intervened, in part, because its interests would not be adequately represented by the named State defendants, one of whom (the Governor) opposed passage of 394 and one of whom (the Attorney General) recently made a political decision not to appeal. Moreover, the purpose of the initiative power is to allow citizens to act when the political establishment of the State has failed to lead—as has occurred in the WPPSS' crisis.

CONCLUSION

For the reasons stated above, this Court should either summarily reverse the decision of the Court of Appeals, vacate and remand for reconsideration in light of *Energy Reserves* or note probable jurisdiction.

Respectfully submitted,

STIMSON BULLITT
RIDDELL, WILLIAMS, BULLITT & WALKINSHAW
4400 Seattle-1st National Bank Building
Seattle, Washington 98154
206/634-3600

BENJAMIN W. HEINEMAN, JR.*
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
202/429-4000

Counsel for the Don't Bankrupt Washington Committee, Appellant

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* Counsel of Record